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IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. 687

HASKINS BROS. & CO., a Corporation,
Petitioner,

v.

GEORGE W. O'MALLEY, individually and as Collector of Internal Revenue for the District of Nebraska,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE

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HASKINS BROS. & CO., a Corporation, *Petitioner*, v. GEORGE W. O'MALLEY, individually and as Collector of Internal Revenue for the District of Nebraska, *Respondent*.	No. 687

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The United States District Court for the District of Nebraska, Omaha Division, in which the petition was filed, rendered no opinion. Its order sustaining the respondent's demurrer to the petition and dismissing the petition is printed in the Record at pages 25 and 26. The case was not heard or submitted in the Circuit Court of Appeals for the Eighth Circuit.

JURISDICTION

The order sustaining the demurrer and dismissing the petition was entered in said District Court on December

16, 1936 (R. 25-26). The petition for writ of certiorari was filed January 29, 1937, and was granted on February 15, 1937, prior to hearing or submission of the appeal in the Circuit Court of Appeals for the Eighth Circuit, the appeal having been taken and allowed and the case docketed therein on January 2, 1937 (R. 32). *The Three Friends,* 166 U. S. 1, 49; *U. S.* v. *Bankers Trust Co.,* 293 U. S. 548; *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 333-4. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 8(b) of that Act (43 Stat. 936, 938-940).

SUMMARY STATEMENT OF THE CASE

This is a suit at law[1] for the recovery of $26,843.02 collected by the Respondent, George W. O'Malley, as Collector of Internal Revenue for the District of Nebraska, from the Petitioner, Haskins Bros. & Co., an Iowa corporation engaged in the business of manufacturing soap with its principal office and place of business in the city of Omaha, Nebraska. Said amount of $26,843.02 was claimed by the Respondent to be due from the Petitioner as a tax imposed by Section 602½ of the Revenue Act of 1934 (Act of May 10, 1934, Chapter 277, 48 Stat. 763) at the rate of three cents a pound on the first domestic processing of coconut oil of Philippine origin used by the Petitioner in its business during the months of June, July, August, September and October, 1935 (R. 1, 2, 12). Payments to the Respondent were made as follows:

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[1]**The jurisdiction of the United States District Court is based on U. S. C. A., Title 28, Section 41, Subdivisions 1 and 5.**

For Month of June, 1935, paid July 31, 1935	$5,770.16
For Month of July, 1935, paid Aug. 31, 1935	5,872.65
For Month of Aug., 1935, paid Sept. 30, 1935	4,267.37
For Month of Sept., 1935, paid Oct. 31, 1935	3,656.40
For Month of Oct., 1935, paid Nov. 30, 1935	7,276.44
	$26,843.02

On January 13, 1936, the Petitioner filed with the Commissioner of Internal Revenue a claim in prescribed form for the refund of said amount of $26,843.02. The Commissioner of Internal Revenue rejected said claim on February 5, 1936 (R. 22).

The tax was levied purely as an internal revenue tax and its validity must depend on its being such, since petitioner does not import coconut oil from the Philippine Islands but purchases all of its supplies thereof from dealers who import the same. The first domestic processing does not take place until the coconut oil has come to rest in petitioner's tanks located in the city of Omaha, Nebraska (R. 3, 4). There is some Philippine coconut oil imported into the United States and used therein without being processed in the United States. Under the terms of Section 602½ of the Revenue Act of 1934 this oil would not be taxable (R. 4). The entire burden of the processing tax is borne by petitioner because competitive conditions in the sale of soap are such that none of it can be passed on (R. 5). The proceeds of the tax, under the terms of the statute, do not go into the general fund of the United States but into a special fund for transmission to the autonomous Government of the Commonwealth of the Philippine Islands. None of the proceeds of this tax collected from petitioner or from others have yet been remitted to the Government of the

Commonwealth of the Philippine Islands. That Government has given no subsidy to its producers of coconut oil or growers of copra (R. 6). The amount in the special fund was at the time this suit was brought in excess of thirty million dollars (R. 6). Petitioner contends that the statute in question is unconstitutional and on this account demands a refund (R. 8, 12).

THE STATUTES INVOLVED AND THEIR LEGISLATIVE HISTORY

The principal statute involved is Section 602½ of the Revenue Act of 1934 (Act of May 10, 1934, Chapter 277, 48 Stat. 763). This is printed in full in the Appendix, pages i-iv. Subdivision (a) of Section 602½ of the Revenue Act of 1934, which levies the processing tax complained of, in so far as it applies to coconut oil of Philippine origin, reads as follows:

> "There is hereby imposed upon the first domestic processing of coconut oil, sesame oil, palm oil, palm kernal oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. * * * All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection. For

> the purposes of this section the term 'first domestic processing' means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate."

The provision for a processing tax upon coconut oil of Philippine origin was placed in the Revenue law of 1934 at the request of domestic producers of lard, cottonseed oil, tallow, peanut oil, soy bean oil, fish oils and butter.[1] The object was of course to benefit these domestic oils and fats. It soon appeared, however, that the imposition of such a processing tax might be considered a breach of faith toward the producers of coconut oil in the Philippines in that in the Philippine Independence Act (§ 6b) the United States had undertaken to levy no import tax upon the first 200,000 long tons of coconut oil imported from the Philippine Islands. It was, therefore, proposed that the Revenue Act be amended to provide that all of the proceeds of the processing tax on coconut oil of Philippine origin be turned over to the Philippine Government. This was objected to on the ground that the Philipping Government could nullify the intended effect of the tax, that is, to benefit domestic oils and fats, by granting a subsidy to its producers of coconut oil, copra and allied products. In the course of the bill through Congress an amendment was therefore proposed and carried which provided as follows:

> "All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and

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[1]**See Revenue Revision 1934, hearings before the Committee on Ways and Means, House of Representatives, 73d Congress, 2d Session, page 579.**

paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection."

(See p. 70, footnote 9, for references to Senate hearings and debates.)

That the original proposal was regarded as a breach of faith toward the Philippine producers of coconut oil was expressly recognized by the President of the United States. On May 28, 1934, the Chief Executive dispatched the following letter to Congress:

"To the Congress of the United States:

"Early in the present session of the Congress the Philippine Independence Act was passed. This Act provided that after the inauguration of the new interim or commonwealth form of government of the Philippine Islands trade relations between the United States and the Philippine Islands shall be as now provided by law. Certain exceptions, however, were made. One of these exceptions required levying on all coconut oil coming into the United States from the Philippine Islands in any calendar year in excess of 448,000,000 pounds, the same rates of duty now collected by the United States on coconut oil imported from foreign countries.

"It is, of course, wholly clear that the intent of the Congress by this provision was to exempt from import duty 448,000,000 pounds of coconut oil from the Philippines.

"Later in the present session, the Congress in the revenue act imposed a 3-cent per pound processing tax on coconut oil from the Philippines. This action,

was, of course, directly contrary to the intent of the provision in the independence act cited above.

"During this same period, the people of the Philippine Islands, through their legislature accepted the provisions of the independence act on May 1, 1934.

"There are three reasons why I request reconsideration by the Congress of the provision for a 3-cent-per-pound processing tax:

"First. It is a withdrawal of an offer made by the Congress of the United States to the people of the Philippine Islands.

"Second. Enforcement of this provision at this time will produce a serious condition among many thousands of families in the Philippine Islands.

"Third. *No effort has been made to work out some form of compromise* which would be less unjust to the Philippine people and at the same time attain, even if more slowly, the object of helping the butter and animal fat industry in the United States.

"I, therefore, request reconsideration of that provision of the revenue act which relates to coconut oil in order that the subject may be studied further between now and next January, and in order that the spirit and intent of the independence act be more closely followed.

(Signed) Franklin D. Roosevelt."

(Congressional Record, 73d Cong., 2d Sess., Volume 78, Part 9, Page 9682) [Emphasis supplied].

The present status of the Philippine Islands is determined by the Philippine Independence Act (Act of March

24, 1934, ch. 84, 48 Stat. 456 *et seq.*) printed in full in the Appendix at page iv *et seq.*, the Philippine Constitution printed in full in the Appendix at page xxiv *et seq.*, and the Ordinance appended to the Philippine Constitution printed in full in the Appendix at page lv *et seq.* The Philippine Islands are now an autonomous government by reason of the following facts: On May 1, 1934, the Philippine Legislature accepted the Philippine Independence Act. House Document No. 400, 74th Cong., 2d Sess., page 1. On February 8, 1935, a Philippine Constitutional Convention adopted a Constitution for the Philippines. *Ibid.*, pages 5-24. On March 23, 1935, the President of the United States approved this Constitution as in substantial conformity with the Philippine Independence Act. World Almanac, 1937, page 568. On May 14, 1935, the People of the Philippines approved and adopted this constitution. House Document No. 400, 74th Cong., 2d Sess., pages 24, 30. On September 15, 1935 the President, legislature and other officials of the New Philippine Government were elected (New York Times, Sept. 17, 1935, page 15:4), and on October 13, 1935 the results of the election were certified to the United States Government. New York Times, Oct. 13, 1935, page 29:5. On November 15, 1935, the President of the United States inaugurated the new Government of the Commonwealth of the Philippines by proclamation. House Document No. 400, 74th Cong., 2d Sess., page 73.

SPECIFICATION OF ERRORS

The United States District Court for the District of Nebraska, Omaha Division, erred:

1. In sustaining respondent's demurrer to petitioner's petition (Assignments I, II; R. 27).

2. In failing and refusing to overrule respondent's demurrer to petitioner's petition (Assignments I, II; R. 27).

3. In holding and concluding that petitioner's petition failed to allege facts sufficient to constitute a cause of action against respondent (Assignments I, II, V; R. 27, 28).

4. In failing and refusing to hold that it had jurisdiction of the parties and of the subject-matter of this cause (Assignments III, VI; R. 27, 28).

5. In holding and concluding that Section 602½ of the Revenue Act of 1934 in so far as the same attempts to impose a processing tax upon coconut oil of origin in the Philippine Islands is constitutional (Assignments II, IV, VII, VIII, IX; R. 28).

6. In failing and refusing to hold that Section 602½ of the Revenue Act of 1934 in so far as the same attempts to impose a processing tax upon coconut oil of origin in the Philippine Islands is unconstitutional (Assignments VII, VIII, IX, X; R. 28).

7. In failing and refusing to hold that petitioner had complied before filing this action with all jurisdictional requirements as to filing claim for refund (Assignment VI; R. 28).

8. In failing and refusing to hold that the object and purpose of the processing tax imposed by Section 602½ of the Revenue Act of 1934 upon coconut oil of origin in the Philippine Islands was to raise the prices of competing oils and fats produced in the United States (Assignment VII; R. 28).

9. In failing and refusing to hold that Section 602½ of the Revenue Act of 1934 did not levy an excise tax but enacted a statutory plan to regulate the intrastate production and sale of domestically produced oils and fats which are in competition in the United States with coconut oil of origin in the Philippine Islands (Assignment VIII; R. 28).

10. In failing and refusing to hold that the provision in Section 602½ of the Revenue Act of 1934 for the payment of the proceeds of said alleged processing tax upon coconut oil of origin in the Philippine Islands to the Philippine Government was an inseparable part of a statutory plan and scheme for regulating matters of intrastate concern (Assignment VIII; R. 28).

11. In failing and refusing to hold that the exaction imposed by Section 602½ of the Revenue Act of 1934 upon domestic processing of coconut oil of origin in the Philippine Islands was not to raise revenue, to pay the debts, or provide for the common defense or general welfare of the United States (Assignment IX; R. 28).

12. In holding and concluding that the exaction imposed by Section 602½ of the Revenue Act of 1934 upon the domestic processing of coconut oil of origin in the Philippine Islands was to raise revenue, to pay the debts, or provide for the common defense or general welfare of the United States (Assignment IX; R. 28).

13. In failing and refusing to hold that the Philippine Islands at all times after the enactment of Section 602½ of the Revenue Act of 1934 were not a part of the United States within the meaning of the revenue clauses of the Federal Constitution (Assignments XI, XII, R. 29).

14. In failing and refusing to hold that from and after November 15, 1935, when the autonomous government of the Commonwealth of the Philippine Islands was duly established, the Philippine Islands were not a part of the United States within the meaning of the revenue clauses of the Federal Constitution (Assignment XII, R. 29).

15. In failing and refusing to hold that petitioner was totally unable to recover any of the taxes sued for by passing on the same to customers in increased prices (Assignment XIII; R. 29).

16. In failing and refusing to hold that the Government of the Commonwealth of the Philippines has never paid any subsidy to the producers of coconut oil, copra and allied products in the Philippine Islands (Assignment XIV, R. 29).

ARGUMENT

Section 602½ of the Revenue Act of 1934 levies a tax of three cents per pound upon the first processing of coconut oil within the United States. It is clear from the legislative history of the Act that this tax was imposed for the aid and benefit of producers of domestic vegetable and animal oils and fats. By the provisions of the Act itself, the proceeds of the tax upon coconut oil produced in the Philippines do not become a part of the funds of the United States Government, since it is required that they "shall be held as a separate fund and paid to the treasury of the Philippine Islands". No restriction is imposed upon that Government in respect of the use of such proceeds, but it is provided that "if at any time the Philippine Government provides by any law for any subsidy to be paid to the pro-

ducers of copra, coconut oil or allied products, no further payments to the Philippine treasury shall be made under this subsection".

The Revenue Act of 1934 was passed about two months after passage of the Philippine Independence Act, which was approved March 24, 1934. By that Act [Sec. 6 (b)] it was provided that 200,000 long tons, or 448,000,000 pounds of coconut oil be admitted into the United States free of duty for a period of ten years after the date of the inauguration of the new Philippine Government. An excise tax of 3 cents a pound on the first processing of Philippine coconut oil could, therefore, be reasonably anticipated to yield a revenue of not less than $13,430,000 per annum. From July 1, 1934, the effective date of the Revenue Act, to January 31, 1937, a period of thirty-one months, it actually yielded $44,336,506.19.[1] It is understood that the amount collected thereunder now approximates or exceeds $50,000,000, all of which is still being held in the separate fund provided for by the Act, and none of which has been paid over to the Philippine Government, pending the decision of this and similar cases.

As a result of the Independence Act, the Philippines are no longer a possession of the United States. While their independence does not become complete for a period of ten years, and while in the interim certain rights of sovereignty are reserved to or conferred upon the United States, the United States is without right or power during such period

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[1]These figures are taken from the Annual Reports of the Commissioner of Internal Revenue for the fiscal years ended June 30, 1935 (pp. 68-69) and June 30, 1936 (p. 22), as supplemented by Form 22, "Abstract of the United States Internal Revenue Collections" for the month of January 1937.

to prescribe a form of government for the Philippines, or to define its duties or powers, and has expressly granted to the Government of the Commonwealth of the Philippine Islands "all * * * rights which may have been acquired in the Philippine Islands by the United States under the treaties" with Spain of December 10, 1898 and November 7, 1900 (Point I, page 14 *et seq., post*).

The effect of the Act is to make a gift to the Government of the Commonwealth of the Philippine Islands of all the proceeds of the tax imposed, to be used by it for any purpose that it sees fit, provided only that if it pays a bounty to the producers of coconut oil in the Philippines, no further payment of the proceeds of such tax shall be made to it. Among the reasons pressed upon Congress for passage of the Independence Act was the fact that the Philippine people had demonstrated over a period of years their capacity to sustain a self-supporting government, and it was the clear intent of that Act that the Philippines should be financially independent of the United States (Point II, page 22 *et seq., post*). The accumulations under this tax are now, within a short space of less than three years, almost sufficient, when added to the sinking fund accumulated at the time of the passage of the Independence Act, to pay off the entire public debt of the Philippine Islands (see page 40, *post*).

Since before 1909 it has been the policy of the United States to require the Philippine Government to be supported out of revenues collected within the islands themselves. The successful accomplishment of this policy is attested by the facts laid before Congress at the time of the passage of the Independence Act. It cannot be contended that the imposition of this tax, within the United States, and the devotion

of its proceeds to the use of the Philippine Government was necessary to prevent breakdown of government in the Philippines, or to enable that government to carry on its functions, or in aid of the execution by the United States of the powers reserved to it by the Independence Act. Such contention, if made, would be contrary to the facts known to Congress at the time of the passage both of the Independence Act and of the Revenue Act of 1934 (Point III, page ***29, et seq., post***).

The first question that arises, therefore, is whether an excise tax levied within the United States, all the proceeds of which are required to be "held as a separate fund and paid to the Treasury of the Philippine Islands" is a tax levied "to pay the debts" or to "provide for the common defense and general welfare of the United States".

I

SINCE THE PHILIPPINES ARE NO LONGER A POSSESSION OF THE UNITED STATES, AND THE UNITED STATES NO LONGER IS UNDER ANY DUTY, NOR HAS IT THE RIGHT TO PRESCRIBE A GOVERNMENT THEREFOR, OR TO DEFINE ITS POWERS AND DUTIES, EXPENDITURES BY THE UNITED STATES THEREIN CANNOT BE JUSTIFIED ON PROPRIETARY GROUNDS.

The Philippines never were a part of the United States, but a possession of it (*Downes* v. *Bidwell*, 182 U. S. 244, 286, *The Case of the Fourteen Diamond Rings*, 183 U. S. 176, 180, *Dorr* v. *United States*, 195 U. S. 138, *Balzac* v. *Porto Rico*, 258 U. S. 298). As a result of the passage of the Independence Act, they are no longer a possession.

Unlike Alaska and Hawaii, the Philippines have never been incorporated into the United States even as a territory, From the beginning it has been the purpose of the United States ultimately to give to the Islands their independence. This purpose was reiterated and officially declared in the preamble of the Jones Act, by which substantial autonomy was conferred upon the people of the Philippine Islands.[1]

The Philippine Independence Act, appendix, page iv, is entitled:

> "An Act to provide for the complete independence of the Philippine Islands, to provide for the adoption of a Constitution, and a form of government for the Philippine Islands, and for other purposes."

Section 1 of the Act empowers the Philippine Legislature to convene a Constitutional Convention within the Islands

> "to formulate and draft a Constitution for the Government of the Commonwealth of the Philippine Islands, subject to the conditions and qualifications prescribed in this Act, *which shall exercise jurisdiction over all the territory ceded to the United States* by the Treaty of Peace concluded between the United States and Spain on the 10th day of December, 1898. * * *

Section 2 (a) provides that the Constitution shall be Republican in form, shall contain a bill of rights, and re-

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[1]"Whereas it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein * * *". Act of August 29, 1916 (U. S. C. A., Title 48, Secs. 1001 *et seq.*; 39 Stat. 545).

serves to the United States the exercise of certain powers for a period of ten years, to be conferred upon it through embodiment in the Constitution of the Commonwealth. Through the adoption of that Constitution, these powers derive their present force therefrom.

While the Government of the Islands will not become fully sovereign for a period of ten years, and while during this period the United States has been empowered to exercise certain rights of sovereignty thereover, the powers reposed in the United States do not include the power to prescribe a form of government for the Philippines during the ten-year period, or thereafter, or to define the duties and powers of such government. Section 7 (1) of the Independence Act confers upon the President a veto power over all amendments to the Constitution adopted during the ten year period. No power is reserved in or conferred upon the President or upon Congress itself to initiate amendments or to impose upon the Islands any form of government other than that contained in the Constitution, adopted by them or as subsequently amended by them.

Section 10 (a)[2] provides that at the expiration of the ten-year period the President "*shall* by proclamation with-

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[2]**Section 10 (a) reads as follows:**

> **"on the 4th day of July immediately following the expiration of a period of ten years from the date of the inauguration of the new government under the constitution provided for in this Act the President of the United States shall by proclamation withdraw and surrender all right of possession, supervision, jurisdiction, control, or sovereignty then existing and exercised by the United States in and over**

draw" all rights and sovereignty then being exercised by the United States and "*shall* recognize" full and complete independence of the islands "under the constitution then in force". No right to impose any condition whatsoever upon the Philippine Islands as a condition precedent to the execution of this duty is reserved. The United States has therefore irrevocably granted to the people of the United States their independence, although its Government does not become possessed of all of the attributes of sovereignty for a period of ten years.

Finally, Section 5 of the Independence Act provides that:

> "All the property and rights which may have been acquired in the Philippine Islands by the United States under the treaties mentioned in the first section of this Act, except such land or other property as has heretofore been designated by the President of the United States for Military and other reservations of the Government of the United States, and except such land or other property or rights or interests therein as may have been sold or otherwise disposed of in accordance with law, *are hereby granted* to the government of the Commonwealth of the Philippine Islands when constituted." (Emphasis ours.)

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the territory and people of the Philippine Islands, including all military and other reservations of the Government of the United States in the Philippines (except such naval reservations and fueling stations as are reserved under section 5), and, on behalf of the United States, shall recognize the independence of the Philippine Islands as a separate and self-governing nation and acknowledge the authority and control over the same of the government instituted by the people thereof, under the constitution then in force."

By this section the United States ceded or granted to the Government of the Commonwealth all rights in the Islands acquired from Spain, subject to be defeated only by failure of the People of the Islands to adopt a Constitution of their own and set up a government thereunder. The Independence Act was approved March 24, 1934, and was accepted by the Philippine Legislature on May 1, 1934, House Document No. 400, 74th Cong., 2d Sess., page 1. On February 8, 1935 the Constitutional Convention framed a Constitution certified by the President to conform to the requirements of the Independence Act. *Ibid.*, pages 5-24. On March 23, 1935, the President approved this Constitution (World Almanac, 1937, page 568), and it was adopted by the People of the Philippines on May 14, 1935. House Document, No. 400, 74th Cong., 2d Sess., pages 24, 30. Elections required to be held thereunder were held on September 15, 1935 (New York Times, Sept. 17, 1935, page 15:4), and the establishment of the Government of the Commonwealth proclaimed by the President on November 15, 1935. House Document, No. 400, 74th Cong., 2d Sess., page 73.

To all intents and purposes the Philippines, therefore, ceased to be a possession of the United States upon the enactment of the Independence Act and its acceptance by the Philippine Legislature, although formal transfer of governmental powers from the Philippine Government, as set up by the Jones Act, to that of the Commonwealth did not take place until later. Every act done in the Islands or by the United States, including the passage of the Revenue Act of 1934, was done in anticipation of such transfer.

The United States is no longer possessed of any power to impose upon the people of the Philippines a form of gov-

ernment, or to change that which they have provided for themselves in their own constitution, or to exercise generally the powers of government therein. *Its interest is no longer that of a proprietor but of a guardian.*

The principal powers conferred upon the United States for a period of ten years by the Philippine Constitution, pursuant to the requirements of the Independence Act, are:

(1) Control over foreign relations [Sec. 2(a), (10)];

(2) The right to maintain military reservations and armed forces, and to call into the service of the United States all military forces organized by the Philippine Government [Sec. 2, (a), (12)], accompanied by provision that all citizens of the Philippines during such period shall owe allegiance to the United States, and that every officer of the Philippine Government shall take an oath to maintain true faith and allegiance thereto [Sec. 2(a), (1) and (2)];

(3) The right to intervene when necessary for preservation of the Government, or to insure the discharge of its obligations "in accordance with the provisions of the Constitution" [Sec. 2(a), (14)];

(4) A limited veto and supervisory power over the fiscal operations of the Government [Sec. 2(a), (6) and (9), Sec. 7 (4), Sec. 2(a), (14)—the provision conferring the right to intervene hereinbefore noted—and Sec. 7 (2)], all to be read, however, in connection with Sections 2(a), (7) and Sections 2(b), (3) and (5), and Section 9, by which all existing liabilities of the preexisting government are to be assumed by the new Government, both during the ten-year period and upon its expiration, and any ob-

ligation of the United States therefor is expressly disclaimed.

In respect of the provisions relating to the fiscal operations of the Philippine Government, which would appear to be those most directly connected with the question at issue, it is enough at this point to say that they clearly contemplate that the Philippine Government should be financially independent of the United States and self-supporting (see Point II, page 22 *et seq., post*).

Provisions, in addition to those already noted [other than that providing for review by this Court of cases from the Philippine Islands, Sec. 2(a), (13), Sec. 7(6), and that conferring a veto power over acts affecting immigration, contained in Sec. 2(a), (9)], relate to the property rights of the United States and its nationals [Sec. 2(a), (4), 2(b), (1)], to the civil rights of the latter [Sec. 2(a), (16)], to the rights of citizens or inhabitants of the Philippine Islands under the immigration laws of the United States (Sec. 8), to trade relations between the two countries [Sec. 2(a), (5), Sec. 6], or provide for religious toleration [Sec. 2(a), (3)] and for the maintenance of an adequate system of public schools primarily conducted in the English language [Sec. 2(a), (8)]. These all relate to the rights and privileges of the United States and its nationals, to trade relations and to other matters which might well be appropriately included in a treaty between two independent nations, and are in no wise inconsistent with complete sovereignty.

The other sections, previously referred to, obviously constitute limitations upon the exercise of complete sovereignty by the Government of the Islands for a period of ten years and authorize the exercise by the United States of certain

powers. The relation created, however, would appear to be that of guardianship. Certainly the status of the United States is no longer that of a proprietor. In respect of conduct of all local matters, the Philippine Islands are completely autonomous. Neither the President nor Congress is empowered to veto any law relating to the internal affairs of the Philippines except in a limited way in respect of its fiscal operations. In respect of these it has no right to initiate or impose taxes of any description, while its veto power is limited to those on imports and exports.

We think it unimportant to determine exactly what the status of the Philippine Islands at the present time is. It is perhaps unlike that of any other people in the world today, but whatever it is, the following conclusions would appear to be incapable of refutation:

(1) That the Islands are no longer a possession of the United States, and that the interest of the United States therein is no longer proprietary:

(2) That the United States is no longer under the obligation, nor has it the power to prescribe a form of government for the Islands, to define its powers, or the manner of their exercise, or to interfere generally in its internal affairs, but only in a limited way, and then primarily in respect of matters directly or indirectly affecting its external relations or fiscal operations; and

(3) That, as to the latter, it was the intent of the Act and of the Constitution adopted thereunder that the Philippine Government should be financially independent of the United States and self-supporting, although providing for a limited degree of guardianship in the United States.

II

THE DEMONSTRATED CAPACITY OF THE PHILIPPINE PEOPLE TO SUSTAIN A SELF-SUPPORTING GOVERNMENT WAS ONE OF THE MAIN REASONS PRESSED UPON CONGRESS FOR THE ENACTMENT OF THE PHILIPPINE INDEPENDENCE ACT, AND IT WAS THE CLEAR INTENT OF THAT ACT THAT THE PHILIPPINE GOVERNMENT SHOULD BE FINANCIALLY INDEPENDENT OF THE UNITED STATES. BY THE TERMS OF THE ACT ITSELF, THE UNITED STATES EXPRESSLY DISCLAIMED ANY RESPONSIBILITY FOR THE THEN EXISTING OR FUTURE DEBTS OF THE PHILIPPINE GOVERNMENT.

It appears to have been the policy of the United States from an early date that the Government of the Philippines should be self-supporting. In its report to the Secretary of War for the year ended June 30, 1909, the Philippine Commission, under the heading of "Recommendations," said:

> "The Commission believes that the expenses incurred in connection with the regular civil functions of the Philippine government should be paid for from its receipts and is satisfied to carry on the work of the government without direct appropriation from the National Treasury, but in case Congress is disposed to help the Philippine Islands in the matter of education and push the work faster than the insular treasury can stand, we shall be glad to see a considerable annual appropriation made for education from the National Treasury. An additional amount of $2,000,000 annually could be spent with great advantage to the islands.

> "*All the work of the insular government is now being performed with insular funds, the Philippine government being strictly self-supporting,* the only assistance received from the United States being the payment of an amount which comes to about two-thirds of the annual cost of coast surveys. These coast surveys are being carried on more rapidly than the civil government would do were it not for their military importance, which justifies the performance of part of this work with funds of the United States." Report of Governor-General (1909) pages 48-49. (Emphasis ours.)

We are not advised to what extent Congress adopted the recommendation of special appropriations for educational purposes, or for how long it continued to make appropriations for the coast surveys. A search of the Appropriation Acts since the passage of the Jones Act in 1916, however, discloses that between 1916 and the passage of the Independence Act in 1934, *no* money whatsoever was appropriated by Congress out of the Federal Treasury for the support of the Philippine Government.[1] It was therefore not

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[1]We have been furnished with an advance proof of the government's brief in the companion case of *Cincinnati Soap Company* v. *United States* (No. 659). In footnotes 32 through 40, at pages 44 and 45 of this brief, a number of Congressional Acts are cited which it is claimed indicate that Congress has spent large sums of money in the Philippine Islands, for the government of the Islands, for public works, public health, agriculture, education, postal service, the taking of a census, assistance to the native military and relief of disasters.

An examination of the statements made by the Government in these footnotes and of the Congressional Acts themselves discloses in the first place that with two exceptions the amounts appropriated have been inconsequential when compared to the annual expenditures of the Philippine Government which now aggregate approximately 75,000,000

only the policy and aim of the United States for twenty-five years prior to the Independence Act to make the Philippine

pesos ($37,500,000) (Moody's Governments, 1937, p. 93). One of the two exceptions is the Act of March 3, 1903, cited in notes 32 and 40 appropriating $3,000,000 for the relief of distress in the Philippine Islands. This, of course, was during the military occupation of the Islands by the United States immediately after their cession by Spain. This appropriation was doubtless for the purpose of meeting the emergency situation created by the Philippine insurrection. The other appropriation, large enough to be seriously considered, is mentioned in footnote 34 and consisted of rental and benefit payments made to sugar producers in the Islands under the Sugar Quota Act, which was part of the AAA scheme. This, of course, has no bearing upon our situation.

The statement made in the Government's brief at the bottom of page 44 to the effect that large appropriations have been made for the government of the Philippine Islands is not supported in any way by the statutes it cites. The Act of June 8, 1898, and the Act of February 14, 1902, cited in note 32 were for purely military expenditures during the time of military occupation by the United States. The very small expenditures provided for in the remaining statutes were in connection with such purely incidental matters as (1) agricultural research involving an expenditure of only about $2,000 a year, and obviously intended to benefit the United States; (2) the removal of lepers from one American colony to another (Guam); (3) aid to Filipino soldiers who had been in the United States Army, or who desired to enter West Point; (4) the taking of a census, doubtless for our own guidance; and (5) extension to the Philippine Islands of the United States postal service. It does not appear from the annual report of the Governor-General (1935), cited in note 33 to the effect that the United States Army constructed 13 water systems in the Philippine Islands, that the United States paid for these systems. Even if they did, they are of minor consequence.

Instead of controverting our contention that the Philippine Islands have been self-supporting at least for the last 25 years, the unimposing total of these instances developed by assiduous research on the part of the Government clearly proves the contrary. It is moreover to be noted that in each and every instance, in direct contradistinction to our situation, the appropriation is made for definite and specific purposes.

Government self-supporting, but that policy had been successfully carried into effect.

That the Philippines had proved their ability to be self-sustaining financially was one of the main considerations pressed upon Congress by the Committee reports recommending bills providing for their independence. The Independence Act of March 24, 1934 was preceded by the Hare-Hawes-Cutting Act. In the Senate Report on the Hare-Hawes-Cutting Act (Senate Report 781, 71st Cong., Second Session), recommending its passage there appears the following statement:

> "*The Philippine government has been self-supporting since the establishment of civil government in the islands.* The only expenses incurred by the American Government are those in connection with the United States Army stationed in the Philippines. The Philippine government has been and is in a sound financial condition. Its income is in excess of its expenditures for the present necessary activities of the island government." (p. 14.) (Emphasis ours.)

The Philippine Legislature refused to accept this bill. The Independence Act of 1934 was thereafter introduced in the Seventy-third Congress as H. R. 8573. In presenting this bill to the House, Mr. McDuffie in charge of the bill said:

> "The bill is substantially a reenactment of the Hare-Hawes-Cutting Act"[2] (Cong. Rec., 73rd Cong., Second Session, Vol. 78, Part 5, p. 4834).

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[2]The following statement by him, fully supported by a comparison of the two acts, indicates the only material difference between them:

> "The only change involved under the terms of this bill, or I should say the major change presented in

In the House report accompanying H. R. 8573—the bill which by its passage became the Independence Act of 1934—the Committee (House Report 968, 73rd Cong., Second Session) said:

> "A careful analysis of the Philippine question and of all the evidence submitted at the hearings held before the Committee discloses the following facts:
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> * * * * * * * * *
>
> "4. Every step taken by the United States since the inception of American sovereignty over the Philippines has been to prepare the Filipino people for independence. *As a result, they are now ready for independence* politically, socially, and *economically* (p. 5).
>
> "At a time of universal depression, when most nations, large and small, are beset with fiscal difficulties, *the government of the Philippines is in a sound financial condition.* This statement is corroborated by the report of the Insular Auditors. From the exhibits left with the Committee *it appears that the Philippines not only have succeeded in balancing their budget but have in fact accumulated a surplus. Even in 1932, and in the face of curtailment of revenues, the Philippine budget will be balanced without increased taxation or abandon-*

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this bill, is that provision in section 10 whereby we agree when independence is accomplished to remove our Army and relinquish the Army reservations. We continue to retain our naval bases and coaling stations, but agree to enter into negotiations with the new independent government to determine the feasibility of further maintenance of our Navy in the islands." (Cong. Rec., 73rd Cong., Second Session, Vol. 78, Part 5, p. 4834.)

ment of essential government services. The budgetary system was adopted in the Philippine Islands before it became operative here.

"It was urged by the proponents of independence in the presentation of their views to the Committee that this wise stewardship of the insular revenues evidences the ability of the Filipinos to manage one of the most difficult departments of government in one of the worst financial dislocations of recent years (p. 12).

"Our purpose in the Philippines has been accomplished. The unity of the people is a fact. Their readiness and their eagerness for self-government have been abundantly demonstrated. *Their financial capacity to support their government is beyond question.* They have a balanced budget, a stable currency, a sound and efficient administration of justice, a successful system of public instruction" (p. 15). (Emphasis ours.)

The clear intent of the Independence Act was that the new Government to be set up thereunder should be likewise self-supporting.

Section 2(a) (7) provides:

"The debts, liabilities, and obligations of the present Philippine government, its Provinces, municipalities, and instrumentalities, valid and subsisting at the time of the adoption of the constitution, shall be assumed and paid by the new government."

Section 9 reads as follows:

"There shall be no obligation on the part of the United States to meet the interest or principal of bonds and other obligations of the government of the Philippine Islands or of the Provincial and

> municipal governments thereof, hereafter issued during the continuance of United States sovereignty in the Philippine Islands; * * *."

Both of these provisions became immediately effective and hence are to be operative throughout the ten-year period.

Section 2(b) (3) provides that the Constitution shall contain the following provision, effective as of the date of ultimate independence:

> "That the debts and liabilities of the Philippine Islands, its Provinces, cities, municipalities, and instrumentalities, which shall be valid and subsisting at the time of the final and complete withdrawal of the sovereignty of the United States, shall be assumed by the free and independent government of the Philippine Islands; and that where bonds have been issued under authority of an Act of Congress of the United States by the Philippine Islands, or any Province, city, or municipality therein, the Philippine government will make adequate provision for the necessary funds for the payment of interest and principal, and such obligations shall be a first lien on the taxes collected in the Philippine Islands."

Section 2(b) (5) provides that the foregoing provision shall be embodied in a treaty between the Philippine Islands and the United States.

The Act therefore contemplates that the Philippine government shall be financially independent of the United States, both immediately and ultimately, and that the United States shall not be liable for principal or interest of the bonds of the Philippine Government or of its political subdivisions outstanding at the time of the passage of the Independence Act, or which may be issued in the ten-year period

intervening between the setting up of the Government of the Commonwealth and the ultimate independence of the islands.

The public debt of the Islands may not be increased without permission by Congress [Section 2(a)(6)], but all obligation upon the part of the United States on account of any such increased indebtedness is expressly disclaimed (Section 9, *supra*). The Act discloses concern upon the part of the United States that the Philippine Government may not pay the interest and principal upon such debt when due, or meet its obligations. Consequently, certain supervisory powers and rights are conferred upon the United States. Acts affecting currency, coinage, imports and exports require the approval of the President [Section 2(a)(9)],—provisions obviously intended for the double purpose of maintaining a sound financial structure and for control of imports and exports in the interest of American trade; but no power is conferred upon the United States to initiate import or export duties, and none whatever to initiate or veto property or excise taxes or other exactions within the Islands designed to provide the Government with revenues.

Section 6 provides that during the ten-year period import duties shall be collected in the United States on certain products of the Philippines in excess of specified quantities, but does not provide that the proceeds of such import duties shall be paid over to the Philippines. The same section provides that beginning with the sixth year after inauguration of the new Government, export taxes in stated amounts shall be levied upon such articles, the proceeds of which shall be applied solely to the payment of the principal and interest on the bonded indebtedness of the Islands.

If the Philippine government fails to pay any of its bonded indebtedness or the interest thereon when due, or to fulfill any of its contracts, the United States High Commissioner, upon the direction of the President, may take over the customs offices and apply such part of the revenue therefrom as may be necessary to make good such defaults [Section 7(4)]. No obligation, however, is imposed upon the United States to make good such defaults out of its own treasury.

Section 7(2) empowers the President to suspend the taking effect of or the operation of any law, contract or executive order of the government which, in his judgment, will result in the failure of the government to fulfill its financial obligations.

All of these provisions are consistent with financial guardianship, but not with proprietorship. They confer upon the United States or its President a limited veto power over the fiscal operations of the Philippine Government. They do not confer upon the United States any affirmative power to provide in what manner the revenues of that Government shall be raised, or any general control of its expenditures.

Every line and syllable of the Independence Act looks to the immediate and complete financial independence of the Philippines and to the maintenance, in the Islands, of a self-supporting government. Indeed, as we have seen, it has been so for a quarter of a century, even during the period when it was the right and duty of the United States to provide some form of government for the Islands—a right and duty which expired with the Independence Act, or at least with the adoption of the Philippine Constitution.

III

SINCE THE ENTIRE PROCEEDS OF THE TAX ARE REQUIRED TO BE PAID OVER TO THE AUTONOMOUS PHILIPPINE GOVERNMENT TO BE EXPENDED IN ITS UNCONTROLLED DISCRETION, IT IS NOT A CONSTITUTIONAL EXACTION.

1. By providing that the entire proceeds of the tax should be paid over to the Philippine Government, to be expended for any purpose which that Government sees fit, Congress exceeded constitutional limitations, both upon its power to tax and its power to spend.

Article I, Section 8, Clause 1, of the Constitution confers upon Congress the power

> "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States".

These words constitute both a grant of power and a limitation upon its exercise. Hamilton, Report on Manufactures, Dec. 5, 1791; Story on the Constitution (5th Ed.), §§ 918-922; *United States* v. *Butler*, 297 U. S. 1. This is so because the United States is a government of limited and enumerated powers. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Kansas* v. *Colorado*, 206 U. S. 46, 81. The limitation applies to the power to spend as well as to the power to tax (*United States* v. *Butler, supra*), although in this case were the contrary true it would be immaterial since the validity of a tax must always depend upon its being levied for a public purpose in the case of a State tax and a national purpose in the case of a Federal tax.

It is true that where expenditure is to be made out of Treasury funds raised by general taxation there would appear to be no effective means of preventing Congressional abuse of the spending power by recourse to the courts. This is not because such an appropriation would be within the constitutional power of Congress, but solely by reason of procedural obstacles. *Massachusetts* v. *Mellon*, 262 U. S. 447, 482. Where, however, the proceeds of the exaction are ear-marked by the statute itself to be devoted to a designated purpose, the Court may and will determine, through a suit by the taxpayer, whether it is a constitutional exaction. *United States* v. *Butler*, 297 U. S. 1.

Even the power to tax to pay the debts of the United States is not an unlimited power. As said by Story:

> "* * * No advocate for the doctrine of a restrictive power will contend, that the power to lay taxes to pay *debts* authorizes the payment of all debts which the United States may choose to incur, whether for national or constitutional objects, or not. The words, 'to pay debts,' are therefore either antecedent debts, or debts to be incurred 'for the common defence and general welfare,' which will justify Congress in incurring any debts for such purposes. * * *" [Story on the Constitution (5th Ed.), Vol 1, § 921.]

In respect of the power to tax and spend to provide for the general welfare, Hamilton, in his Report on Manufactures, *supra*, said:

> "The only qualification of the generality of the phrase in question, which seems to be admissible, is this: That the object to which an appropriation of money is to be made be general, and not local; its

> operation extending in fact or by *possibility* throughout the Union, and not being confined to a particular spot." [Emphasis ours.]

Unlike the exaction in the *Butler* case, thought by the dissenting Justices to be valid, there is no "possibility" that the operation of the objects, for which the revenue to be derived from this tax may be spent, may extend "throughout the Union". This circumstance alone distinguishes this exaction from any other which might be levied by Congress to provide for the general welfare by its appropriation to particular uses throughout the Union.

Story, an adherent of the Hamiltonian construction of this clause, and whose reading of it was adopted by a majority of the Court in *United States* v. *Butler, supra,* and apparently concurred in by the minority, says:

> "A power to lay taxes for any purposes whatsoever is a general power; a power to lay taxes for certain specified purposes is a limited power. A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them. If the defence proposed by a tax be not the common defence of the United States, if the welfare be not general, but special, or local, as contradistinguished from national, it is not within the scope of the Constitution. If the tax be not proposed for the common defence, or general welfare, but for other objects, wholly extraneous (as, for instance, for propagating Mahometanism among the Turks, or giving aids and subsidies to a foreign nation, to build palaces for its kings, or erect monuments to its heroes), it would be wholly indefensible upon constitutional principles. The power, then, is, under

> such circumstances, necessarily a qualified power." [Story on the Constitution (5th Ed.), Vol. 1, § 922.]

All the proceeds of the tax are to be paid over to the Philippine Government to be used for any purpose for which it sees fit. They may be devoted to the purpose of constructing railroads, building good roads, construction of water works, electric light plants or other internal improvements, to pay the expenses of administering that Government itself, to pay off its bonded indebtedness (for which the United States has expressly disclaimed any responsibility), to pay bounties to the growers of sugar to be brought into the United States in competition with cane and beet sugar grown in this country, or for any other special or local purpose to which the Philippine Legislature in its wisdom sees fit to apply them. Unless it be held that any expenditure of money in the Philippines is for the general welfare of the United States, it is plain that this bulk appropriation of the proceeds of the tax to the Philippine Government to do with as it pleases transcends the constitutional limitations of both the power to tax and the power to spend.

No such illimitable power to tax and spend for any purpose thought by Congress to be conducive to the national interest exists in respect of the exercise of the power to tax and spend within the United States itself. The argument that the phrase "general welfare"

> "should be liberally construed to cover everything conducive to national welfare"

and

> "that decision as to what will promote such welfare rests with Congress alone, and the courts may not review its determination"

was expressly rejected in *United States* v. *Butler, supra,* pages 64-65. Nor is there anything in the dissenting opinion to the contrary. On the contrary, that opinion, like the opinion of the majority, analyzes and reviews the nature and purpose of the tax and the resulting appropriation and is based upon the conclusion that the appropriation under attack was, in fact, for the general welfare of the United States within the meaning of the Constitution.

Although those objects of expenditure, which may be sustained under the general welfare clause, will doubtless vary with changes in conditions and will be affected from time to time by growth and change in our national life, the power is not unlimited, else the Government would cease to be one of enumerated powers. The bulk appropriation of the entire proceeds of this tax to the Philippine Government to be used by it for any purpose which it sees fit is, therefore, an appropriation beyond the scope of the spending power. As said by Story:

> "* * * Money cannot be applied to the general welfare, otherwise than by an application of it to some particular measure, conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises, whether the particular measure be within the enumerated authorities vested in the Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made. This fair and obvious interpretation coincides with, and is enforced by, the clause in the Constitution, which declares that no money shall be drawn from the treasury but in consequence of appropriations by law. *An appropriation of money to the general welfare would be deemed rather a mockery than an observ-*

> *ance of this constitutional injunction."* [Story on the Constitution (5th Ed.), Vol. 1, § 918.] [Emphasis ours.]

How much more certain is it that this is true when the appropriation is in general to the autonomous Philippine Government and not even required to be spent for its general welfare, much less that of the United States.

The proceeds of this exaction are not required to be used for any particular purpose or purposes, but may be used for any purpose whatsoever.[1] It is therefore unnecessary to determine under what circumstances and to what extent the proceeds of a tax levied in the United States may be earmarked for expenditure in the Philippine Islands when required to be devoted to specific purposes upon the ground that such specific purposes are for the general welfare of the United States.[2] In view of the status created

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[1]The Philippine Legislature is not even required to apply these moneys to public as distinguished from private purposes. Of course, no tax is valid which is levied for private as distinguished from public purposes. *Citizens Savings & Loan Association* v. *Topeka*, 20 Wallace 655; *Parkersburg* v. *Brown*, 106 U. S. 487; and *Cole* v. *La Grange*, 113 U. S. 1.

[2]In the advance proof of the government's brief in No. 659 (pp. 29-30) the Government refers to special purpose taxes levied by the British Parliament "for the purpose of carrying on a war", for the purpose of "defraying the expenses of the household", or of maintaining the civil lists, and for poor rates, church rates, sewer rates, lighting and watching rates. It also refers to the levy of special purpose taxes in this country "for roads, for schools, and the like". In a footnote (p. 30) it lists a number of special purpose taxes previously levied by Congress. Their very description discloses that in each case the purpose for which the proceeds were required to be used was to pay the debts, or to provide for the common defense or general welfare of the United States, as, for example, payment of the public debt, protec-

by the Independence Act, we question the power of Congress to levy any such tax. But neither before nor after the status created by that Act may an exaction—all the proceeds of which are to go in bulk to the Philippine Government to be expended as it chooses—be sustained as a tax levied to provide for the common defense and general welfare of the United States.

2. This exaction has not been levied to enable the United States to perform any of its obligations or duties under the Philippine Independence Act.

The exaction cannot be defended as one levied in aid of the execution of the powers reserved to the United States under the Philippine Independence Act. Nor is the nature of those reserved powers such as to justify such an exaction even if the use of the proceeds were limited to such purpose. By the Philippine Independence Act the United States may continue to maintain military and naval bases in the Islands and to appropriate property for that purpose. This exaction is not levied for the support of the military and naval forces or establishments of the United States in the Philippine Islands. If so, it might perhaps be defended as a tax levied to provide for the common defense of the United States, but, if so, its proceeds would be required to be paid into the United States Treasury, not into that of the Philippine Government. If it be conceivable that they could be required to be paid into the latter, in view

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tion of the frontiers of the United States, etc. The tax in question, all of whose proceeds are to be paid over to the Philippine Government, to be done with as it pleases, bears no resemblance to the special purpose taxes to which the Government refers in this part of its brief.

of that Government's autonomous status, a restriction would certainly be necessary to require the funds to be held by the Philippine Government for the use of the United States instead of for the use of the Philippine Government at its pleasure.

By the Independence Act, control of the foreign relations of the Philippine Islands is reserved to the United States. The proceeds of this exaction are not limited to the execution of this power, and manifestly the application to this purpose of the $50,000,000 in revenue which has accrued in three years would be wholly fanciful. Power is also reserved in the United States to intervene in the Philippine Islands in the event that the Philippine Government fails to maintain law and order and carry on its functions. Expenditures incurred in the exercise of this reserved power would be the expenditures of the United States, not of the Philippine Government. Nor are the proceeds required to be held by the Philippine Government to reimburse the United States for any such expenditures that it may incur in the future. Neither can there be any possible basis for any contention that there would be a breakdown in the administration of the Philippine Government unless put in possession of the funds to be raised by this exaction. Conditions in the Philippine Islands, as disclosed by reports accompanying the submission of the Independence Bill to Congress, as well as known conditions in the Philippine Islands at this time, negative any such pretense.

The remaining—and, in many respects, the principal—power reserved to the United States by the Philippine Independence Act is a limited veto power over the fiscal operations of that government for the sole purpose of seeing that it pays the principal and interest on its bonded indebt-

edness as they become due, together with the power to take possession of the customs offices and devote customs revenues to the curing of any default in such obligations. As we have already pointed out, the United States has not assumed—but expressly disclaims—any liability of its own in respect of such payments. The history of the times and the Committee reports accompanying the Philippine Independence Act completely negative the suggestion that the proceeds of this tax are required by the Philippine Government in order to meet its financial obligations.

But let us assume that, instead of providing that the entire proceeds of the tax should be paid over to the Philippine Government to be used for any purpose for which it sees fit, they were required to be used solely for the purpose of paying the principal and interest on the funded debt of the Philippines themselves. Such a use would clearly be bad. However much it might be to the interest of the United States to see such debt paid, a tax levied for this purpose would not be one to pay the debts or provide for the general welfare of the United States. As we have seen, the power to tax and spend for the purpose of paying debts of the United States is not a power unlimited in scope, but is limited to a power to tax and spend for the purpose of paying debts already accrued or subsequently incurred to provide for the common defense and general welfare of the United States itself. A tax levied to pay the debts of the Philippine Government does not fall within the limits of such power.

Although the proceeds of the exaction were indeterminate in amount at the time of the passage of the Revenue Act of 1934, it was reasonably to be anticipated that it would be productive of a revenue approximating not less

than $14,000,000 per year. This is so because by the Independence Bill, 488,000,000 pounds of coconut oil are to be admitted free of duty into this country. The tax became effective July 1, 1934. Between that date and January 31, 1937, $44,336,506.19 has been collected thereunder, and it is understood that today the collections amount to $50,000,000. Mr. McDuffie, in charge of the Philippine Independence Bill in the House, in presenting such Bill thereto stated that at the date of its submission (March 19, 1934), the bonded indebtedness of the Philippine Islands was 170,000,000 pesos[3], against which there was a sinking fund of 50,000,000 pesos then on deposit in American banks (Congressional Record, 73rd Cong., 2nd Sess., Vol. 78, Part 5, p. 4835). The taxes already accumulated under the Act in dispute are therefore more than sufficient today, when added to sinking fund accumulations, to pay off the entire bonded indebtedness of the Philippine Islands. Had they been earmarked for this purpose the tax would have been clearly bad. Yet, upon their receipt by the Philippine Government, it may, if it chooses, pay off its entire bonded indebtedness through the receipts derived from this tax levied upon citizens of the United States. This circumstance was known to Congress at the time but no restriction against such use was provided.

A tax levied for the support of a State government would not be one to provide for the common defense or general welfare of the United States (*Passenger* cases, 7 Howard 446), even assuming that Congress may appropriate money for the use of the States for specific purposes, which,

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[3]The peso's value is 50 cents. Since Mr. McDuffie stated that $65,000,000 was the equivalent of 170,000,000 pesos, that figure is probably in error and intended to be 130,000,000 pesos. In this event the debt would be $40,000,000. At the most it would be $60,000,000.

had the money been expended directly by the Federal Government, would fall within the general welfare. Under the Independence Act, the Philippines are as fully autonomous as are the States of the Union, and an appropriation for the general support of that Government would seem to be equally bad.

3. This exaction may not be supported upon the theory that it was necessary to prevent the breakdown of orderly government in the Philippine Islands.

It may be admitted that after, as well as before, the passage of the Independence Act, the United States has an interest in seeing that orderly government is maintained in the Philippines. This tax, however, may not be supported upon the theory that it is necessary to prevent the breakdown of such government. Reference has already been made to the Committee Reports before Congress at the time of the passage of the Independence Act (pp. 24-26, *ante*). These reports showed that the Philippine Government was in a sound financial condition, fully capable of supporting itself, and as said in the Senate Report on the Hare-Hawes-Cutting Act, such government had been "self-supporting since the establishment of civil government in the Island". As pointed out in these reports, the United States had not contributed to the expenses of the Philippine Government for a quarter of a century. Its policy had been to make the Islands self-supporting, and that policy had been successfully pursued.

Before the passage of the Independence Act it was the duty of the United States to provide a government for the Philippine Islands. Even then the power of Congress to levy a tax upon the people of the United States, anticipated to yield approximately $14,000,000 per annum, all the pro-

ceeds of which were to go to the Philippine Government, irrespective of its necessities, was, to say the least, doubtful. In this connection the following word of warning in *Binns* v. *United States,* 194 U. S. 486, as to the power of Congress to raise revenue in a territory for the benefit of the United States, as distinguished from the power to raise revenue for the support of the territorial government, is not without significance:

> "In order to avoid any misapprehension we may add that this opinion must not be extended to any case, if one should arise, in which it is apparent that Congress is, by some special system of license taxes, seeking to obtain from a Territory of the United States revenue for the benefit of the nation as distinguished from that necessary for the support of the territorial government." (p. 496.)

There is nothing in the legislative history of the Revenue Act of 1934 to indicate any intention by Congress to depart from the settled policy of a quarter of a century to make the Philippine Government support itself. Nor is there anything in the legislative history of the Revenue Act of 1934 to suggest the existence of any such crisis or situation in the Philippines as would require the levy of a special purpose excise tax in this country, all of the proceeds of which should be held for and paid over to the Philippine Government. On the contrary, its legislative history discloses that the whole purpose of the tax was something entirely different, viz., to aid domestic producers of animal and vegetable oils and fats. The amendment providing for the payment of proceeds of the tax to the Philippine Government was offered by Senator Norris on the floor of the Senate. In presenting it no reference was made to the needs

or requirements of the Philippine Government. Nor is such a reference to be found anywhere in the course of the debate. The information contained in the reports accompanying the Philippine Independence Bill conclusively negatives the existence of any necessity for financial aid.

The effect of the provision is to make a gift to the Philippine Government of the entire proceeds of the tax, to be used for any purpose for which that government sees fit, save only for the payment of bounties to the producers of coconut oil or the growers of copra. A tax having such a purpose is not a tax to pay the debts or provide for the common defense and general welfare of the United States.

4. The exaction may not be justified as intended to carry out any moral obligation of the United States to the Philippine Government.

It is claimed that the provision for the payment of the proceeds of this exaction to the Government of the Commonwealth of the Philippine Islands, these proceeds now amounting to at least $50,000,000, can be justified on the ground of a moral obligation, citing *United States* v. *Realty Company,* 163 U. S. 427. The situation in that case, however, was vastly different from ours. In the Tariff Act of 1890 Congress had provided for certain bounties to domestic sugar producers. These producers had been required to take out licenses and in the applications therefor to estimate the amount of sugar to be produced in the current year, to which estimates their production plans had of course to be adjusted. It was also necessary for the producers to give a bond for faithful observance of the rules and regulations to be prescribed by the Commissioner of Internal Revenue for the manufacture and

production of sugar. During several years large sums of money were paid to sugar manufacturers, all manufacturers continued to manufacture in reliance upon the Act's provisions, and no officer of the Government questioned the validity of the Act. In preparing for the sugar season commencing in the fall of 1894, sugar manufacturers had to plan without knowing whether the bounty provisions of the Tariff Act of 1890 would be held valid, they having been attacked in the case of *Field* v. *Clark*, 143 U. S. 649, in which case, however, the court declined to decide the question. In *United States ex rel. Miles, etc.* v. *Carlisle*, 5 D. C. App. 138, the Court of Appeals for the District of Columbia held the sugar bounty portions of the Tariff Act of 1890 unconstitutional. Congress then passed an act granting bounties to the producers of sugar who had complied with the provisions of the Tariff Act of 1890, which bounties were attacked in the *Realty Company* case. This Court held, without deciding as to the constitutionality of the original Act, that Congress was justified in paying these bounties on the ground that the sugar producers had an equitable, meritorious and moral claim irrespective of whether they had a strictly legal claim.

In our case, however, no moneys were appropriated to the Philippine Government because of any equitable, meritorious or moral claim. If the statute, as originally proposed, which levied a processing tax upon coconut oil of Philippine origin, had been passed, it may be that the United States would have adopted a technical method of evading the provisions of the Philippine Independence Act agreeing not to levy an import tax on the first 200,000 long tons of coconut oil imported from the Philippine Islands. It is doubtless arguable that this action would also have con-

stituted a breach of a moral obligation, *not however, with respect to the Philippine Government but with respect to the producers of coconut oil in the Philippine Islands.* When in the Act as passed it is provided that the proceeds of the exaction are to be paid to the Philippine Government under such conditions as effectively to prevent reparation of the injury to producers of coconut oil in the Philippine Islands, it is somewhat ironical to claim that the statute provides for the payment of a moral obligation. Obviously, the statute is a device to prevent the moral obligation, if there be one, from being carried out. The Government's argument that Congress was entitled in this manner to repair alleged economic dislocations in the Philippine Islands resulting from the taxing part of the statute is to be answered in the same way because it is the same argument. By "economic dislocations" must be meant the injury to producers of Philippine coconut oil.

5. This payment to the Philippine Government cannot be justified as the performance of an international obligation of a political nature.

There is nothing in *Luther* v. *Borden*, 7 How. 1; *Terlinden* v. *Ames*, 184 U. S. 270; or *Mountain Timber* v. *United States*, 243 U. S. 219, 234, which in any way assists the Government in its contention that a bulk contribution of this kind could be made even to a foreign government. The proceeds of this exaction are not being employed in the regulation of the foreign relations of the United States or in carrying out its treaty or other obligations connected with the management of its foreign affairs. They are being gratuitously transferred to an autonomous foreign government without respect to any specific obligations of the

United States and for reasons unconnected therewith but connected only with the desire to benefit and regulate domestic interests within the several states. There is no political problem or obligation involved. If the situation could be conceived to be otherwise, then the argument is that Congress can create a political problem by a tax and in the same breath repair it by provisions with respect to the spending of the proceeds.

IV

THE TURNING OVER IN BULK OF THE ENTIRE PROCEEDS OF THIS EXACTION TO THE PHILIPPINE GOVERNMENT TO SPEND AS IT MAY PLEASE IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER OR A VIOLATION OF THE APPROPRIATION CLAUSE OF THE CONSTITUTION OR BOTH.

The power of Congress to appropriate and spend public funds is limited to expenditures to pay the debts and to provide for the common defense or general welfare of the United States. While the determination of Congress that a particular expenditure is for one of these purposes is not, of course, conclusive and may properly be examined by this Court, the appropriation by Congress of the entire proceeds of this exaction to the autonomous Philippine Government for its indiscriminate use needs no such examination as it is so palpably an abuse of the spending power that it must obviously fall. There is not involved the necessity of determining the frequently very difficult question of whether an expenditure immediately special and local in its nature is sufficiently general in its effect to constitute an expenditure in the national welfare.

The spending power of Congress being definitely limited by the Constitution, it is plain that it cannot delegate to others an unlimited undefined power to spend, even if it should happen that the expenditures actually made by the delegate could be upheld as being in the general welfare of the United States or for one of the other allowable national purposes. Constitutional limitations cannot be evaded by resort to complete abdication. This would, of course, be true even if the delegate were properly selected, as, for instance, the President of the United States or the Secretary of the Interior, or perhaps one of the States of the United States. With such delegates as the last-mentioned, it may be that by setting up adequately definite standards or criteria and laying down adequately definite policies to confine the exercise of the delegated spending power within its proper channels, to wit, to pay the debts and provide for the common defense and general welfare of the United States, a constitutional delegation could be made. But delegation to an outside agency such as the Legislature of the autonomous Philippine Government is quite another matter.

What has been said above makes it clearly apparent that there is no necessity for us to argue the frequently difficult question with respect to the adequacy of standards or policies promulgated by Congress. In *Schechter* v. *United States*, 295 U. S. 495, it was argued that adequate standards and policies had been laid down, but this Court disagreed. In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, one Justice thought that the statute sufficiently canalized the powers granted. Shortly prior to the decision of this Court in the *Schechter* case, the New York Court of Appeals in *Darweger* v. *Staats* (April 26, 1935), 267 N. Y.

290, 196 N. E. 61, held unconstitutional the so-called State Recovery Act for New York. This Act attempted to make the standards of fair competition within the State of New York uniform with those promulgated under the Code system of the National Industrial Recovery Act, it being provided that the mere filing with the Secretary of State of any Federal Code should *per se* make its requirements the standards of fair competition for the particular trade or industry as to transactions intrastate in character, violations thereof to be misdemeanors. The Court of Appeals held that this was abdication of the legislative function to the Federal Government, but the dissenting Judges thought that the attainment of uniformity was a sufficient legislative policy. This situation may well be contrasted with the delegation by Congress of its spending power to the Legislature of the autonomous government of the Philippine Islands, without any possible justification such as the attainment of uniformity in standards of fair competition.

If the requirements for standards and policies in delegating legislative power applies *in any degree* to the spending power, it has not been complied with. Delegation of the spending power has not been considered by this Court, but in *Township of Franklin* v. *Tugwell*, 85 Fed. 2nd 208, the United States Court of Appeals for the District of Columbia held that the mere mention of "housing" in a Congressional statute was insufficient to define standards and policies for executive spending. In our case the standards and policies provided are not merely insufficient, but are totally non-existent. For another case invalidating a delegation of spending power despite the existence of some standards and policies in the statute, see *Smithberger* v.

Banning (Neb., 1935), 262 N. W. 492. What Congress has done in our case does not even have any justification. What Mr. Justice Stone referred to in his dissenting opinion in the *AAA* case (*United States* v. *Butler*, 297 U. S. 1, at p. 86) as the "great governmental power of the purse" has been handed over lock, stock and barrel to the Government of the Commonwealth of the Philippine Islands, not yet deemed sufficiently competent by Congress to manage its own affairs so as to justify dispensing with the guardianship of the United States, to play with as suits its whim and fancy.

This case is wholly unlike the *Chaco* case (*United States* v. *Curtiss-Wright Export Corp.*, No. 98 October Term 1936, decided December 21, 1936; 57 Sup. Ct. 216). That case dealt entirely with the plenary power of the President of the United States as Chief Executive with respect to foreign relations. It did not deal with the power of Congress to delegate its legislative powers to an instrumentality having no original power in the premises. It held that the Constitution conferred upon the President the sole power to deal with foreign affairs and that it was unnecessary for him to conform to any policies or standards laid down by Congress. Our case is totally different, concerning in no way the powers of the President but only the powers of Congress.

The power to tax and spend is not only limited by Art. I, Sec. 8, Clause I of the Constitution and by the doctrine forbidding delegation of legislative power, which is essential to preserve the separability of the three great departments of government, but Sec. 9, Clause 7 of that Article of the Constitution provides that

> "No monies shall be drawn from the treasury but in consequence of appropriations made by law."

This very important provision of the Constitution has been little discussed by the courts, but the reason for its insertion and its meaning can be gathered from its historical background, from the practical construction accorded to it by Congress and from the opinion of Alexander Hamilton with relation thereto.[1] The clause does not seem to have been considered in any Federal case, but the Supreme Court of Indiana in *Ristine, Auditor of the State of Indiana* v. *Board of Commissioners*, 20 Ind. 328, gave careful consideration to the like clause in the Indiana State Constitution reading:

> "No money shall be drawn from the treasury, but in pursuance to appropriations made by law." (Article X, Section 3.).

At pages 333 through 338 that court discussed the nature of an "appropriation", the evils which are intended to be guarded against by this constitutional provision and the historical background thereof in England. Quoting from Blackstone's Commentaries, Macauley's History of England, Creasy on The English Constitution and Hallam's Constitutional History, the Court clearly demonstrates that this constitutional provision against moneys being drawn from the treasury otherwise than by "appropriations made by law" came down to us as a result of the evils incident to the unlimited spending power enjoyed by the Stuart Kings of England before their discretion was limited by Parliament. It is to be seen from an examination of these

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[1]**An excellent and exhaustive review and analysis of "Early English, Colonial and Congressional Appropriation Acts and Practices", fully bearing out our contention, is contained in Appendix II to Petitioners Reply Brief filed in this Court in *Duke Power Company et al.* v. *Greenwood County et al.* (No. 32, October Term, 1936).**

authorities that the essence of an appropriation is the allocation of specific parts of the public revenue *to specific purposes of government.*[2] It is unnecessary in this case to discuss the question of how specific the designation of purposes must be. That may often be a difficult question, but when no purposes are designated, it is one with which we are not concerned.

The clear evidence of the meaning of the appropriation clause to be found in history is corroborated in the writings of Alexander Hamilton who wrote that the appropriation clause was designed

> "to secure these important ends,—that the *purpose,* the *limit,* and the fund of every expenditure *should be ascertained by a previous law.*" (Italics ours.) [Hamilton's Works (Ham. Ed.), VII, pp. 532, 533.]

Our statute, of course, does not in the least degree meet these requirements.

We have seen (Point III, p. 35 *ante*) that a grant of moneys in general terms even for the general welfare of the United States, without further specification as to purpose, would violate Article I, Section 8, Clause 1, of the Constitution as well as the appropriation clause thereof, because of lack of specification as to purpose. It is thus perhaps unnecessary for us to rely upon the doctrine against delegation of legislative power which is implied from the separate nature of the three great departments of govern-

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[2]This exaction is not, as the Government argues, a "special purpose" tax. It is a "no-purpose" exaction the proceeds of which may be applied at the absolute discretion of the Philippine Government. We do not, as the Government seems to think, argue that the designation of a purpose, if it be a proper public purpose, in a tax law, renders the tax invalid.

ment. But whether this grant is to be tested by the appropriation clause or by the doctrine forbidding a delegation of legislative power, the result is the same. By either test it is condemned by the utter lack of designation of specific purpose.

This would be true even if the grant were made to the President or some other officer of the United States Government, and must be even more true when made to another government. We seriously question the right of Congress to impose a tax, none of whose proceeds are to go into the general treasury of the United States, but all of which are to be paid to the Philippine Government, even for specified purposes, assuming their propriety. Certainly when, in addition to doing this, Congress does not specify for what purposes the money may be used but leaves it to the Philippine Government to appropriate such moneys, collected in the United States, out of the Philippine Treasury for any purpose which it sees fit, the Act is, on its face, invalid.

It is asserted by the Government, however, that if there be no appropriation to a specific purpose or purposes, as there obviously is not, in Section 602½ of the Revenue Act of 1934, an appropriation may be found in the Permanent Appropriation Repeal Act of June 26, 1934 (Chapter 756, 48 Stat. 1224, at p. 1233). Section 20(a) of that Act provides, in so far as relevant: "The funds appearing on the books of the government and listed in subsections (b) and (c) of this section shall be classified on the books of the treasury as trust funds. All moneys accruing to these funds are hereby appropriated, and shall be disbursed in compliance with the terms of the trusts." We presume that the 83 items which follow are intended to be under subdivision (b), although there is no such heading. Items

(1) and (2), which must be intended by the Government, refer, respectively, to a Philippine Special Fund (customs duties) and a Philippine Special Fund (internal revenue). The reference to the statutes at large are 36 Stat. 84 and 46 Stat. 685. Neither of these statutes has anything to do with the proceeds of the tax levied by Section 602½ of the Revenue Act of 1934. Thus, this alleged "appropriation" has nothing to do with our case. Assuming it had, however, it is plain that the so-called "appropriation" adds nothing to the provisions of Section 602½, the purposes for which the moneys are to be expended being in no way made more explicit.

V

THE REQUIREMENT THAT THE PROCEEDS OF THIS EXACTION BE DONATED TO THE PHILIPPINE GOVERNMENT BUT ONLY PROVIDED IT HAS REFRAINED FROM LEGALLY PERMISSIBLE ACTION IN SUPPORT OF ITS PRODUCERS OF COCONUT OIL IS FOR THE SOLE PURPOSE OF AIDING SPECIAL AND LOCAL INTERESTS IN THE UNITED STATES AND CLEARLY PREVENTS THE EXPENDITURE BEING IN THE GENERAL WELFARE OF THE UNITED STATES.

Had this statute required that the proceeds of this exaction be paid over to the producers of our domestic oils in competition in the United States with coconut oil of Philippine origin, there would of course be no question but that the exaction would be invalid as not being levied or spent for the general welfare of the United States, but only in aid of special and local interests. The statute, however,

does specifically require that the proceeds of the exaction be spent in such a way, and in such a way only, as to positively insure that the severe handicap imposed upon coconut oil of Philippine origin by the alleged excise will not be compensated for by a Philippine Government subsidy. In other words, the expenditure is required to be made in such a manner and only on such a condition precedent that the local and special interests of the producers of domestic oils must be positively benefited and the interests of the producers of Philippine coconut oil positively injured.[1] The situation then is that not only do the levy of the exaction and the requirements in connection with the spending of its proceeds have the collateral effect of benefiting the competing products not taxed—which may be proper—but the additional effect, expressly provided for in the statute, of working an additional injury upon the product taxed and an additional benefit upon the competing products not taxed.

Now it may be assumed, without conceding the point, that Federal spending may have collateral effects of an intrastate character without legally making the spending special or local. But to expressly provide in the statute for these local and special effects is to make provision for spending not within the competence of the Congress. That is precisely what has been done in this case. Congress may not insert a provision in the statute expressly insuring local benefits and expressly preventing detriments to local and

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[1]Section 602½ being part of the Revenue Act of 1934 was not part of the AAA scheme. The restriction of cotton, hog and corn production pursuant to the AAA scheme of course raised the selling prices of cottonseed oil, corn oil and lard, domestic products in competition with Philippine coconut oil. Hence the purpose of this exaction and the provisions for its spending was to assist these domestic competing products to sell at the higher prices.

special interests. This is spending for local and special ends and not in the general welfare of the United States.

In order that we may better visualize and appreciate the special and local effects expressly provided for in this statute in violation of both the Tenth Amendment (See Point VI, *post*) and the general welfare clause, let us assume, as was the fact, that before the imposition of this exaction coconut oil of Philippine origin was selling in the United States at seven cents a pound and that domestic oils in competition therewith or capable of being substituted therefor were selling in the United States at eight cents a pound. A proposed tax of three cents a pound is imposed upon coconut oil of Philippine origin, promptly raising its selling price to ten cents a pound and thus enabling the producers of the domestic oils in competition therewith to undersell the coconut oil of Philippine origin. So far nothing beyond the competence of the Congress had been done. Assume further, however, that in the same statute in which this excise tax is imposed, Congress should provide that the proceeds of an entirely proper excise tax on coconut oil of Philippine origin be granted as a subsidy to the domestic oils in competition therewith, would there be any question at all but that what was originally a proper excise tax would now become an unlawful exaction imposed for the purpose of being spent in a local and special manner and not in the general welfare of the United States? We need go no further to invalidate the exaction, but would it not also be obvious that in addition to the illegality of such local and special spending, a clear and definite regulation of intrastate concerns would have been provided for in violation of the Tenth Amendment (See Point VI, *post*).

Now let us turn to the statute as it is. It does not provide that the proceeds of the exaction be distributed as

a subsidy among the producers of the domestic oils capable of being substituted for coconut oil of Philippine origin or in competition therewith. It does, however, specifically and expressly provide for the negative equivalent thereof. It provides that with the proceeds of the exaction there shall be purchased the abstention of the Philippine Government from its perfectly lawful privilege and prerogative of aiding its own producers of coconut oil with a subsidy, whether out of the proceeds of this exaction donated to it under the terms of the statute or in some other way. The only difference between this double-barreled device and the clearly illegal double-barreled device first suggested is that in the first case the local and special interests of the domestic oil producers are subsidized and the price relationship between coconut oil of Philippine origin and the domestic oils, a purely intrastate matter, is regulated, whereas in the second case coconut oil of Philippine origin is crippled in its competition with the domestic oil, not, it is to be noted, by the mere imposition of a lawful excise but by an express prohibitory provision and stipulation of the statute.

Is it not perfectly clear that this device converts the spending (assuming that the bulk donation to the Philippine Government could possibly be, as we deny, in the general welfare of the United States) into a spending for special and local purposes, whether or not in violation of the Tenth Amendment it also affects the regulation of intrastate concerns, to wit, the pegging of the differential in price between coconut oil of Philippine origin and domestic oils? Of course the former consideration alone destroys the statute. But in addition it is perfectly plain, is it not, that an express and far-reaching regulatory effect upon this price relationship in violation of the Tenth Amendment is definitely provided for and effectuated? (See Point VI, *post.*)

VI

NOT ONLY FROM THE LEGISLATIVE RECORD AND SURROUNDING CIRCUMSTANCES BUT FROM THE FACE OF THE STATUTE ITSELF IS IT CLEAR THAT THIS EXACTION IS NOT AN EXCISE LEVIED FOR REVENUE BUT AS DEMONSTRATED BY THE EXTRAORDINARY REQUIREMENTS FOR THE SPENDING OF ITS PROCEEDS IS A DEVICE TO INDUCE OR COMPEL THE USE OF DOMESTIC OILS AND FATS COMPETING WITH PHILIPPINE COCONUT OIL BY PEGGING PRICE DIFFERENTIALS SET UP BY THE EXACTION, AND THUS CONSTITUTES AN INVALID REGULATION OF INTRASTATE COMMERCE.

If the great and almost illimitable power lodged in the Federal Government to levy excise taxes upon transactions internal to the States, and to freely select the objects and victims of taxation, is to be saved from utter abuse, it is plain that exactions of a novel and extraordinary character, having marked intrastate regulatory effects, but labeled excises, should be carefully scrutinized by the courts and unhesitatingly condemned as unconstitutional if they be such

In at least three respects this legislation is either novel or extraordinary. In the first place, the proceeds of the alleged excise never go into the general fund of the United States In the second place, these proceeds are to be paid direct, without prescription as to use, into the treasury of a Government which is no longer a territory or possession of the United States. In the third place, these proceeds are not to be paid to the Philippine Government at all unless it

has complied with an unprecedented and extraordinary condition precedent, to wit, the non-granting of a subsidy to its own producers of coconut oil, copra and allied products.

1. The total lack of concern on the part of Congress with revenue is conclusively demonstrated by the statutory provisions themselves whereby the entire proceeds of the exaction are devoted to the purposes of the Philippine Government, and not to pay the debts or provide for the common defense or general welfare of the United States.

If the mere fact that an exaction raised money was sufficient to sustain it as a tax, then every exaction would be lawful. If the mere fact that an exaction raised money for the general fund of the United States from which Congress is required to appropriate for national purposes was sufficient to justify the legality of any exaction as a tax, then all exactions could be made lawful. But such cases as the *Child Labor Tax Case*, 259 U. S. 20, *Hill* v. *Wallace*, 259 U. S. 44 and *United States* v. *Constantine*, 296 U. S. 287, belie the assertion. Exactions imposed without justification other than to obtain regulatory effects within the States have in many cases in addition to the above been held by this Court to be penalties in the guise of taxes.

Our exaction, however, does not require the application of any such doctrine as laid down by this Court in the cases just cited. We do not complain of the intrastate regulatory effects of this exaction as an exaction. We do complain that it is apparent on the face of the statute that not the slightest attempt has been made by Congress to provide for the spending of the proceeds thereof in the national interest. We do assert that the statutory provision requiring the donation of the entire proceeds of this exaction to

the Philippine Government clearly indicates that the exaction was not levied in the least degree for the revenue purposes of the United States. This method of disposing of the proceeds of the exaction when coupled with the proviso against the subsidizing of coconut oil by the Philippine Government was in fact a device for precisely the opposite purpose, that is to prevent revenue accruing to the United States, while at the same time injuring Philippine coconut oil.

The Government asserts that the statute "appropriates" the money to the Philippine Government, but if so it does this without any specification whatsoever of purpose and indicates very clearly the lack of concern on the part of Congress as to what the Philippine Government should do with the money if only it did not subsidize its producers of coconut oil. Obviously, the statute provides not for an appropriation to specific national purposes but for a gift to the Philippine Government to spend at its will, whim or fancy. The purpose of the statute was not to raise revenue for the proper national purposes of the United States, for to do this would have been a breach of faith toward the Philippine producers of coconut oil whose products the United States had agreed not to burden with an import tax. It is not an import tax and hence does not breach the letter of the agreement, but it plainly breaches its spirit. It can thus be seen that the purpose of this exaction and the extraordinary requirements for the spending of its proceeds was to take money from the processors of Philippine coconut oil and to avoid its becoming revenue of the United States.[1] (See the very apposite remarks of Senators Con-

[1]The Government argues that in considering whether or not Section 602½(a), Revenue Act of 1934, is designed to

nally and Tydings, *infra*, pp. 68, 70.) Thus, entirely aside from its ulterior purpose, the effectuation of which is expressly provided for on the face of the statute, the Act does not constitute a taxing statute at all and is for this reason invalid.

2. That the concern of Congress, to the entire exclusion of a revenue purpose, was with the regulation of the price differentials between Philippine coconut oil and competitive domestic oils and fats is entirely apparent from the proviso against the granting of a subsidy to the former.

We have no quarrel with the doctrine that the motives and purposes of Congress in levying a true excise cannot be searched out and employed to invalidate the tax. If an excise valid on its face is calculated or indeed intended to accomplish moral, social or economic ends, as well as raise revenue, the courts cannot speculate as to what induced Congress to select the particular object of taxation or to fix upon the amount and character of the tax. When, however, Congress is not content to levy an excise and to permit it to have its inevitable but collateral effects (which may

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raise revenue for the purposes of the United States, it is justified in considering the excise taxes levied therein upon coconut oil of non-Philippine origin and upon other imported oils, these being true excises since the proceeds go into the general fund of the United States. Of course, these taxes raise revenues; but the novel, peculiar and extraordinary spending provisions associated with our particular exaction and an integral part thereof do not apply to these taxes. It is plain, therefore, that our exaction is set entirely apart and must be considered, when attacked, entirely separately from what are concededly proper excise taxes which happen to be levied in the same section of the law.

include marked regulatory effects in the intrastate domain) but inserts in the statute as an integral part thereof a provision or provisions having nothing to do with insuring the collection of the tax, or with restricting the spending of its proceeds to proper national purposes, but explainable only as intended to accomplish a forbidden end, we do claim that Congress has exceeded its powers. That is precisely what Congress has done in this instance.

Not content with the ordinary procedure of levying a domestic processing tax of 3¢ a pound upon coconut oil originating in the Philippine Islands[2] and appropriating the proceeds thereof to specific purposes in the "general welfare", Congress by express provision of the statute in which the alleged excise is levied, has provided that the proceeds of the alleged excise shall be disbursed in a particular and unusual way so as to further handicap Philippine coconut oil in its competition in this country with domestic oils. We need not speculate as to what we could do, if anything, if the tax had been levied in the ordinary way so that the proceeds thereof would go into the general fund and an appropriation, even with these extraordinary incidents, made in regular course. The fact is that the levy of the alleged excise and the spending of the proceeds thereof are inextricably tied together. Just as in the AAA processing tax cases, the invalidity of the one destroys the other.

It is concededly competent for Congress to handicap coconut oil of Philippine origin in its competition with domestic oils by the imposition of an excise, and if only an excise is imposed the motives or purposes of Congress will not be inquired into. This statute does not, however, stop

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[2]Equal to nearly one-third of the manufacturing cost of petitioner's coconut oil soaps (R. 5).

with the levying of an excise. It goes further. Not being content with allowing the excise to have the collateral effect of severely handicapping Philippine coconut oil in its competition with domestic oils, Congress expressly stipulates that the proceeds of the excise shall only be spent so as to insure that no attempt shall be made by the Philippine Government to mitigate or destroy the great advantage or price differential granted to domestic oils as a result of what otherwise would have been a legitimate excise. In other words, Congress is not satisfied with the collateral effects of a lawful excise which for reasons of clear public policy we cannot attack by attributing to Congress motives or purposes to regulate what is not its province to regulate. The fatal defect in this statute is that on its face by express provision it seeks to, and inevitably does, insure the accomplishment of an illegal regulation, to wit, the "pegging" of price differentials.

The obvious impossibility of this Court supervising and censoring the motives and purpose of Congress in the levying of ordinary excise taxes upon transactions internal to the several States is plain. So important is the power to tax to the integrity of a government, that it is plain that this Court should be most reluctant, as it always has been, to strike down what appear to be excise taxes upon their face by reason of the motives and purposes of the Congress undisclosed upon the face of the statutes. This reluctance is exhibited in such cases as the *McCray*[3] case and the *Doremus*[4] case.

Prior to the *AAA*[5] case, however, this Court had never been presented with the necessity of examining the motives

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[3] *McCray* v. *U. S.*, 195 U. S. 27.

[4] *U. S.* v. *Doremus*, 249 U. S. 86.

and purposes of the Congress in the exercising of its spending power under the Constitution. The doctrine of *Massachusetts* v. *Mellon*[6] prevents that question from arising but in rare instances. Only in the seldom met with case, of which ours is an example, where Congress has chosen to tie up its imposition of an exaction with the expenditure of the proceeds thereof can the question be effectively raised. This is a freak situation. We do not suggest that even in such an extraordinary and rarely to be met with situation this Court should examine into the mere motives and purposes of Congress in providing for the spending of the proceeds of the exaction. We do suggest that no great harm to the integrity of the taxing power or the spending power could ensue if such an examination was made. No reasons of public policy would seem to prevent the adoption of a doctrine by this Court for the effective restriction of the spending power to its proper channels in the rare cases where its exercise can be attacked. That Congress has frequently abused the spending power because of the inability of any one to attack its pretended exercise thereof in all but rare cases, is hardly to be denied.

When this Court was presented with an abuse of the taxing power by a state legislature with respect to the freedom of the press it found no difficulty in unanimously condemning the motives and purposes of the legislature although undisclosed on the face of the statute. *Grosjean* v. *American Press Company*.[7] In this case of ours the motives and purposes to regulate intrastate matters, obvious from the legislative debates, are not only disclosed on the face

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[5]*U. S.* v. *Butler*, 297 U. S. 1.

[6]262 U. S. 447, 482.

[7]297 U. S. 697.

of the statute *but the intrastate regulation is expressly provided for and ensured by the proviso against subsidy to coconut oil, copra and allied products.* In the *Oleomargarine tax*[8] case, if the Congress not being satisfied with the regulative effectiveness as a collateral matter of a large tax upon oleomargarine colored to resemble butter, had provided that the seller of oleomargarine should in no event sell the product for less than the cost of its production plus the tax, would there be any question but that Congress had acted in violation of the Tenth Amendment?

We know of no case where upon the face of the statute an express provision can be pointed to which requires and commands the levying of a tax or the disbursement of the proceeds thereof for the purpose of local regulation, in which the exaction has been held to be valid. *Hampton & Co.* v. *United States,* 276 U. S. 394, is no exception. That case involved tariff duties which are a regulation of foreign commerce and not an exercise of the taxing power. *University of Illinois* v. *United States,* 289 U. S. 48; *Head Money* case, 112 U. S. 580. In exercising its plenary power to regulate foreign commerce, Congress can impose penalties against the importation of goods of the same kind as are manufactured in this country. It is obvious that the lowering and raising of tariffs may benefit, injure or destroy businesses within the United States. These are unavoidable but collateral effects. The mere fact that Congress mentions in the preamble to a tariff statute that one of its purposes in levying the tariff is to benefit domestic industry does not detract from the validity of the tariff. If, however, Congress, not being content with collateral effects, should insert in such a statute, as it has done in

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[8] *McCray* v. *U. S.*, 195 U. S. 27.

our case, an express provision to insure the efficacy of the tariff to bring about a regulation of local matters, that would be quite another matter. The mere disclosure of an improper collateral purpose is one thing. The express providing for intrastate regulatory effects is another. Moreover, as the Government points out, tariffs to protect domestic industry have been known and approved since the First Congress, while the instant statute is a novel and extraordinary device having no justifiable purpose or possibility of wide application.

3. The legislative record conclusively shows that Congress in imposing this exaction and providing for the spending of its proceeds was not in the least concerned with raising revenue for legitimate national purposes but only with the intrastate matter of regulating the selling price differentials between Philippine coconut oil and competitive domestic oils and fats.

Even a casual examination of the legislative record and debates upon this Act would demonstrate to the reader that Congress' sole purpose in passing this Act was to establish a price differential between coconut oil of Philippine origin and domestic oils in competition therewith in favor of domestic oils, and after establishing this price differential to maintain and "peg" it against any effective action by the Philippine Government. For the effectuation of this purpose, the Congress put into the statute a provision to the effect that the proceeds of the tax should only be paid to the Philippine Government in the event that this Government had not granted any subsidy to coconut oil, copra or allied products. Nothing more than this is necessary to

show the illegal purpose of the exaction. It is not merely that the purpose is disclosed but that Congress has taken a definite and concrete step on the face of the statute to effectuate the unauthorized purpose.

We could well rest here without even adverting to the legislative debates, for we do not rely upon what was said there, even in part. We merely call attention briefly, however, to what went on in Congress as in confirmation of the obvious purpose to be effectuated by the express provision of the statute.

The 3¢ a pound levy on coconut oil, as imposed in the bill reported by the Finance Committee of the Senate, was a true excise with the money going into the general fund of the United States. As the United States in the Philippine Independence Act had agreed to levy no import tax upon the first 200,000 long tons of coconut oil imported into the United States from the Philippines, it was plain that this proposal constituted a breach of faith toward the Philippine producers of coconut oil. An amendment to the Act was offered by Senator Norris which provided for the payment of the proceeds of the exaction to the Philippine Government together with the proviso that the Philippine Government should not receive the proceeds if it subsidized its own producers of coconut oil, copra, and allied products. (Congressional Record, 73rd Congress, Second Session, Volume 78, Part 6, Page 6380.) This amendment was adopted, and Section 602½ as it now reads was reported out by a Conference Committee (Vol. 78, Congressional Record, p. 7819) and became law.

Senator Norris' remarks in support of his amendment (pp. 6379-82) show very clearly that revenue for the

United States was not being considered in the least and that aid to domestic producers of oils and fats was the sole purpose of the exaction. Senator Reed's queries to him show likewise that he was not greatly concerned with constitutionality.

> "Mr. Norris. Mr. President, I take this opportunity to thank the Senator from Mississippi [Mr. Harrison] for his kindness in agreeing to lay aside the oil amendment until today. * * *
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> "The processing tax which was inserted in the bill by the House provided for a tax of 5 cents a pound upon coconut oil and copra. Its effect, if unmodified, would be the same as though we had levied a tariff tax. The Government would make money out of it because the tax would be paid into the Treasury of the United States.
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> "As one who is in favor of giving independence to the Philippine Islands just as quickly as we possibly can, I voted for every amendment to the Philippine independence bill that had a tendency to bring about that end. Those of us who felt as I did favored those amendments, and then we voted for the bill as it finally became a law.
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> "Mr. President, my amendment in the first place provides that the revenue derived from this tax shall not be covered into the Treasury of the United States but shall be held in a separate fund and paid to the Philippine government. The objection first raised was and is that the Philippine government could still grant a bonus or subsidy in the same amount to the producers of coconut oil and copra in the Philippines, and thus nullify the effect of our tax. In other words, if the Philippine government should do that, our tax would be absolutely of no effect so

far as the importation of coconut oil and copra from the Philippines are concerned. It would not help us and it would not help the American farmer. The Philippine producer of the coconut oil and copra would be able, with a bonus of the same amount as the tax, to sell as he did before, and the American farmer would get no benefit from the tax.

"To meet that objection, it is provided in my amendment that if the Philippine government at any time shall grant a bonus or subsidy for the production of coconut oil or copra, then the provision will at once become null and void and of no effect, and the producers will stand under the amendment of the committee just as it was reported.

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"Mr. Connally. Mr. President, I desire to ask the Senator a question about his amendment. Suppose the Filipino government should say, 'We will take this tax, and then we will just pay it back to the producer.'

"Mr. Norris. They cannot do it under the amendment.

"Mr. Connally. The Senator's amendment would prohibit that?

"Mr. Norris. Yes, sir.

"Mr. Connally. In other words, they could neither use the tax as a subsidy, nor could they grant an independent subsidy?

"Mr. Norris. They could not do either one.

"Mr. Connally. If that be true, I cannot see why the amendment would not have the effect of aiding the domestic producer because the tax would be paid, and it is immaterial from his viewpoint what is done with it, whether it is thrown in the sewer or given to the Philippine government.

"Mr. Norris. The Philippine government will get the money. They can use it in any way they want to use it, except as prohibited by the amendment itself; and that only goes so far as to say that, while they are getting this money, they must not by law provide for giving a subsidy to the production in the Philippine Islands of copra and coconut oil.

"Mr. Reed. Mr. President—

"The Vice President. Does the Senator from Nebraska yield to the Senator from Pennsylvania?

"Mr. Norris. Let me yield first to the Senator from Iowa (Mr. Murphy), who has been trying for some time to get my attention.

"Mr. Murphy. Mr. President, the Senator from Texas (Mr. Connally) has asked the question I had in mind.

"Mr. Johnson. Mr. President—

"Mr. Norris. Very well. I yield, then, to the Senator from Pennsylvania.

"Mr. Reed. Mr. President, has the Senator considered the question whether we have power to levy a tax by a law which on its face states that the revenue is not to be taken for the American Treasury, but for the treasury of an alien government?

"Mr. Norris. No; in my judgment, we probably could not do that. I have never thought of it before; but, at first blush, I should say that if we gave the tax to an alien government, there would be something in that suggestion. We are not doing that, however. We are giving it to our wards. They are now under our Government, and we are supreme as to them. We can pass any law in that regard that we desire to pass.

"Mr. Reed. I grant that; but I do not believe that the Federal Government has the constitutional

power to levy a tax for the benefit of any other government, whether it is the government of the city of Omaha or the government of the Philippine Islands or a government set up under any other system.

"Mr. Norris. I do not agree with the Senator. I do not believe that any constitutional provision is involved here by which this tax would be nullified; and we have done the same thing in our tariff laws. We have given back, in some instances, tariffs that have been levied.

"Mr. Reed. To other governments?

"Mr. Norris. No; not to other governments."

Senator Tydings summed the whole matter up at page 6312, *Ibid*, when he said:

"I have been approached by people from my own state who were over here by the dozens saying they wanted this tax imposed in order to keep Filipino products out of this country. That is all that is behind it. There is not an ounce of revenue in it. It is a lie on its face. It does not deserve the support of any man who wants to keep faith and be honest with the Filipino people."

The whole course of the debate in the Senate after the proposal of the amendment is to the same effect.[9]

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[9]The discussions in the Senate are found on pages 6308 to 6325, 6327 to 6732, and 6380 to 6389 of the Congressional Record, 73rd Congress, Second Session, Volume 78, part 6.

4. This device for regulating intrastate matters in the guise of a tax is condemned by the principles enunciated in the *AAA* case, *U. S.* v. *Butler*. Assuming the minority in that case were justified in believing the regulatory effects of that statute to be doubtful and speculative, those in our case are definite and certain.

Our situation, of course, is not in all respects the same as that presented in the AAA processing tax cases which seem to be the only cases in this Court which have considered the propriety of a particular exercise of the power to spend by Congress. The underlying objection to this statute is, however, the same in principle, and we respectfully submit that it presents a much clearer example of an improper exercise of that power, entirely aside from the special and local spending point which we have already discussed.

In the *AAA* case the minority thought that the intrastate results obtained by the spending were collateral and that the coercion was speculative and doubtful. In our case the effect of the prohibited regulation is direct and certain. The Philippine Government is completely disabled from assisting its producers of coconut oil to overcome the price differential clamped down by the exaction against coconut oil in this country in favor of domestic oils. The price in this country of coconut oil of Philippine origin is definitely fixed by express provision of the statute and not merely by the collateral effects of an excise tax. The price of such coconut oil being fixed and pegged, it is inevitable, not merely probable, that the prices of competing domestic oils will rise. Surely this is Federal regulation of intrastate concerns.

Congress has under the guise of taxes—held by this Court to be penalties—sometimes attempted to regulate intrastate concerns. *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; *United States* v. *Constantine,* 296 U. S. 287. In only one case, to our knowledge, has it attempted to do so under the guise of the spending power. In the processing tax cases (*United States* v. *Butler,* 297 U. S. 1) this Court held that when the proceeds of an exaction were required to be spent in such a way as to coerce or induce farmers to agree to restrict production, the tax was invalid, the fact of coercion being deduced from what the Court concluded was the competitive disadvantage suffered by farmers not agreeing to restrict production and hence receiving no pecuniary benefits. In our case there is no necessity to speculate about the competitive disadvantage of the producers of Philippine coconut oil brought about by the expressly conditioned spending. The statute expressly provides that there is to be no spending unless there be no subsidy. The growers of Philippine coconut oil have been —by express provision of the statute—kept in a situation wherein they will feel the full impact of the competitive disadvantage induced by the tax of 3c a pound on their coconut oil normally selling for 3c a pound. In the *AAA* case, those farmers who did not agree to restrict production had (as the dissenting opinion points out) the unlimited privilege of increasing production, which privilege was denied to the contract-signers. Their competitive disadvantage through not receiving the subsidy was, therefore (it was argued), uncertain and speculative. In our case, it is unquestionably definite and certain.

That the principles laid down in the *AAA* case cover our situation clearly appears from the following. At page

73 of the opinion of this Court in that case, Mr. Justice Roberts, after stating that an appropriation to be expended by the United States under contracts calling for violation of a State law would be clearly unconstitutional, spoke as follows:

> "Is a statute less objectionable which authorizes the expenditure of Federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action."

The learned Justice had previously said that even if the AAA plan could be assumed to be non-coercive and purely voluntary, it would stand no better so far as Federal power is concerned.

Section 602½ of the Revenue Act of 1934 contains these words:

> "* * * All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection."

The United States thereby makes a unilateral contract with the Philippine Government whereby it promises to pay to the Philippine Government the entire proceeds of this exaction, not on condition that that Government use the funds for specified purposes or does not use them for prohibited purposes, nor in return for any promise by the Phil-

ippine Government, but in return for an act of abstention expected to be performed by the Philippine Government. So long as that Government abstains from subsidizing its producers of coconut oil, copra, or allied products, it is to receive from the United States the entire collections from this exaction. If at any time it grants such a subsidy, no future payments are to be made. The only purpose of such a proviso can be "to induce action in a field in which the United States has no power to intermeddle." It is true that the action or rather the refraining from action which is immediately induced is that of the Philippine Government. This cannot, however, affect the situation. Its cooperation is purchased in a scheme to maintain the price differentials in the United States between coconut oil of Philippine origin and domestic oils brought about by the processing tax. Congress itself has no power to maintain this price differential. How can it then be said, even assuming that the Philippine Islands can in any way still be regarded as a territory for which Congress may make rules and regulations, that it can exert this power by purchasing the cooperation of a subordinate instrumentality to attain the illegal end?

In this connection, the examples given by Mr. Justice Roberts at pages 75 and 76 of the *Butler* opinion are of considerable interest, and some at least of them quite analogous. The first example given is of the imposition of a tax upon producers of raw materials and the appropriation of the proceeds to processors thereof "either with or without conditions imposed as the consideration for the payment of the subsidy," the purpose being to reduce the prices of raw materials and to correspondingly increase the welfare of the processors of these raw materials. The only difference between this situation and ours is that in-

stead of giving the proceeds of the tax imposed upon those to be injured to those to be benefited the proceeds are disposed of in such a way as to prevent the compensatory conferring of benefits upon those who have been injured by the tax. What difference does it make whether benefits which might legally be conferred upon a competitive product are purchased from or the proceeds of an otherwise proper tax donated to the untaxed competitors whom it is desired to additionally benefit? The other four examples given by Mr. Justice Roberts involve the purchase by the Federal Government of the cooperation of intrastate businesses in carrying out regulations of local matters which Congress has no power to effectuate. If the cooperation of persons engaged in local activities cannot be purchased by the Federal Government for the regulation of those activities, then how can it be claimed that the cooperation of the autonomous government of the Philippine Islands can be so purchased for the same purpose?

VII

THE GRANT TO THE PHILIPPINE GOVERNMENT WITH THE PROVISO AGAINST A SUBSIDY IS AN INTEGRAL AND ESSENTIAL PART OF THE STATUTORY SCHEME, LACKING WHICH THE STATUTE WOULD NEVER HAVE PASSED, AND THE PROVISION AGAINST A SUBSIDY HAVING BEEN COMPLIED WITH, IT IS IMPOSSIBLE TO HOLD THAT THE PROCEEDS OF THE TAX SHOULD GO INTO THE GENERAL FUND OF THE UNITED STATES.

While the statute contains the usual separability clause (Sec. 802, Appendix, page iv), it is settled that separ-

ability provisions in the precise language of that contained in the present Act are merely aids in determining the legislative intent and not inexorable commands.[1] The effect of including such clauses in statutes is simply to reverse the presumption, which otherwise would be indulged in, of an intent that the Act should be wholly ineffective unless held to be validly operative as an entirety.[2] But the inclusion of a separability clause and the presumption thereby created does not authorize the Court to rewrite the statute and give it an effect altogether different from that sought by the statute viewed as a whole.[3] On the contrary, the statute as an entirety is invalid if there is a "clear probability that the invalid part being eliminated, the legislature would not have been satisfied with what remains."[4]

It will be observed that the separability provision[5] does not in terms provide that Section 602½ shall be separable,

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[1] *Dorchy* v. *Kansas*, 264 U. S. 286; *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362.

[2] *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 184.

[3] *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362.

[4] *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242. An inseparability clause creates only "a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained" (*Champlin Co.* v. *Commission*, 286 U. S. 210, 235). As pointed out in *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 184, the presumption created by the separability clause is overcome by considerations which show a "clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part".

[5] "Sec. 802. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby."

but only that the "provisions" of "the Act" shall be separable. The usual rule that mutually dependent provisions of a statute must fall if either is bad[6] has increased force when the provisions are found in the same section of the statute.[7] In the case of the Act before this Court, everything appears *in toto* in a single section of the Act (Sec. 602½, Appendix, pp. i-iv),—convincing evidence that it was intended to operate as a whole.

As the legislative record and debates heretofore discussed in Point VI, Section 3, conclusively show, the purpose of Section 602½ was not to lay an excise for general governmental purposes of the United States. It was to benefit the producers of domestic oils and fats. Congress refused to accept the Act in the form first proposed because of the gross breach of faith involved toward the Philippines. The Revenue Act of 1934, including Section 602½, was passed when the ink was hardly dry on the Philippine Independence Act in which Congress had solemnly pledged its faith through the new Government of the Commonwealth of the Philippines to its producers of coconut oil that it would levy no import taxes upon the first 200,000 long tons of coconut oil imported from the Philippines. While a processing tax would not have technically violated this obligation, it would obviously have violated the spirit of the undertaking. As we have previously shown this was fully recognized by Congress and by the President of the United States. The amendment providing that the entire proceeds of the taxation should go to the Philippine Government, provided only it had granted no subsidy to its own producers of coconut oil, was an integral and essential

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[6] *Allen* v. *Louisiana*, 103 U. S. 80, 84.

[7] *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 112, 113.

part of the statute without which it is impossible to conceive of its passage unless we are willing to say that Congress was willing to violate its solemn pledge toward the Philippine coconut oil producers. To hold that this provision is separable is to force Congress into a breach of faith which it expressly avoided. The result obtained would therefore be the opposite of that intended by Congress. It is perfectly plain, therefore,—in the words of *Pollock* v. *Farmers Trust Co.*, 158 U. S. 601—that the different parts of this Act

> "are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect, the legislature would not pass the latter independently."

An additional result of carving away from Section 602½ the provision for payment to the Philippine Government would be that the proceeds of this tax would be left high and dry in the special fund. The power of Congress by an appropriation act to appropriate this fund to purposes other than that for which it was raised would be doubtful.[8] In *United States* v. *Butler, supra*, we are not aware that the argument was even made that this could not be done, even though in that case no provision had been expressly made in the statute for any special fund.

In one or more of its briefs in this or kindred cases in the Court below, the Government appears to have taken

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[8]To the argument that the tax goes on even if a subsidy be paid, it might be answered that the spending goes on, if there be no subsidy, even after the Philippines are completely free. But the tax falls and does not go on if the spending provisions are invalid, and their invalidity cannot be determined by considering whether or not the subsidy has actually been paid.

the position that since the Act as originally introduced contained no provision for appropriation to the Philippine Government of the proceeds of the excise tax proposed to be levied, and such provision was inserted by amendment, these circumstances indicate that the provisions are separable. They would appear to lead to exactly the contrary conclusion. The undeniable fact disclosed by the legislative record is that Congress refused to pass the bill until amended, so as to appropriate the proceeds of the tax to the Philippine Government. This would appear to us to be conclusive evidence of the legislative intent that the provision made for the disposition of the proceeds was an integral part of the tax itself, without which the latter would not have been imposed.

It therefore appears that the argument against separability in this case is far stronger than in the usual case where the only consideration is whether or not the Court ought to strike out part of the statute and uphold the rest in the belief that Congress would have desired the result. To do so in this case would in addition force a breach of faith upon Congress.

VIII

THIS EXACTION, NOT BEING A TRUE TAX, SINCE THE PROCEEDS DO NOT GO INTO THE GENERAL FUND OF THE UNITED STATES, AND IT IS NOT LEVIED FOR THE SUPPORT OF THE GOVERNMENT OF THE UNITED STATES, IS A NAKED EXPROPRIATION OF PROPERTY VIOLATING THE FIFTH AMENDMENT.

The appropriation clause of the Constitution plainly requires that the proceeds of all taxes shall go into the gen-

eral fund of the United States to be appropriated out by Congress only for specific and reasonably definite purposes within Congressional competence, to wit, for the general welfare and other national purposes of the United States and not to meet special or local demands. (See Points III, IV and V, *ante*.) Concededly the proceeds of this exaction never go into the general fund of the United States but are required by the statute to be held as a mere temporary matter by the Treasury of the United States for transmission to the Philippine Government without any specific or definite appropriation by Congress. The anti-subsidy clause makes the payment to the Philippine Government one for local and special ends (Point V, *ante*).

The power residing in Congress to select the objects and victims of taxation is almost plenary. The justification therefor is that all taxes shall be imposed for the support of the Government of the United States, go into the general fund thereof, and be disbursed in the general welfare thereof or for other national purposes only. Under the power to tax, Congress is free to confiscate the property of particular businesses and classes of persons, not even subject to any equal protection clause, provided only that the proceeds of the taxation go into the general fund and are devoted to the general good by Congress pursuant to reasonably particular appropriations. A safeguard of the highest importance to prevent a contrary practice is the Constitutional requirement in Article I, Section 9, Clause 7, previously discussed in Point IV, *ante*, which reads

> "No money shall be drawn from the treasury, but in consequence of appropriations made by law."

This requires, as we have demonstrated, that Congress turn its mind, when authorizing the disbursement of moneys, to

the particular situations justifying the expenditures and the specific and definite necessity therefor. If in the statute levying the tax—which, it is never to be forgotten, is nothing less than a confiscation of property unless the proceeds are appropriated to the common good—Congress may declare that all the proceeds of an exaction, no matter how large, no matter how unable it may be to determine at the time what the amount of these proceeds may be, and with no definite or specific necessities in mind for their use, much less those of the United States, shall be turned over in bulk, without passing into the general fund, to an autonomous government such as that of the Philippine Islands for expenditure for any purposes, whether or not conceivably connected with the national purposes of the United States, then all Constitutional safeguards are cast to the four winds. The temptation and inevitable result, as evidenced by this very case, is utterly to forego the necessity of viewing the specific needs of definite situations. This is precisely the purpose of the appropriation clause in the Constitution (pp. 45-48, *ante*).

Bearing in mind that taxation, without devotion to the general welfare, or to pay the debts of the United States and to provide for its common defense, is confiscation, it is the worst kind of public policy to permit the disbursement in bulk, without entry into the general fund, to a particular group or a foreign government of the proceeds of an exaction levied upon a particular class of persons. If the proceeds of all taxes go into the general fund, then the beneficiaries of appropriations from the general fund are unable to attribute their supplies of public money, in these days very lavish, to the confiscation of the property of any particular class of persons. Bearing in mind the essentially private ends to which such huge quantities of public funds have

recently been devoted by reason of the fact that in the ordinary case no citizen has the status to question Congressional expenditures, cannot it be said that the appropriation clause in the Federal Constitution was at least meant to prevent the beneficiaries of Governmental largess, consisting of local and special interests, from attributing their benefactions to Governmental confiscation of the property of particular classes of citizens under the guise of taxation, thus increasing their appetite to urge more and more the expropriation of the property of private persons for their private uses? Of what value would the appropriation clause be in its restrictions upon the method of drawing public monies from the Treasury if it could be evaded by the simple device of not putting the proceeds of tax money into the Treasury at all? Is it not obvious that one of its chief purposes was to prohibit the indulgence in the evil public policy of which we have spoken?[1]

The devoting in this case of the entire proceeds of the exaction to the Philippine Government in an amount now approximating $50,000,000 is the more vulnerable because of the fact that there is not even an appropriation in the tax statute to any specific and definite purposes (Point V, *ante*, pp. 45-48). Nor can it be claimed that there has been the slightest consideration of the need of the Philippine Government for any sum of money, much less this huge sum. The money is turned over in bulk to be disbursed at the will, whim and fancy of the autonomous government of the Philippine Islands, providing only that it has granted no subsidy to the producers of coconut oil, copra and allied products. It is submitted that this is expropriation in its baldest form and a clear violation of the Fifth Amendment

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[1]**See pages 50-51, *ante* for Alexander Hamilton's opinion and historical references.**

which prohibits Congress from depriving any person of property without due process of law.

The principle does not differ from one of those which rendered invalid the processing taxes in the *AAA* cases, *United States* v. *Butler*, 297 U. S. 1. At page 61 of the opinion in that case this Court said:

> "It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. * * * The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand. *Child Labor Tax Case*, 259 U. S. 20, 37."

We have argued that the provisions for the spending of the proceeds of this exaction make it a device for the regulation of intrastate concerns, as was true in the *AAA* case. The above-mentioned principle, however, does not depend upon this. The principle now under consideration prohibited in the *AAA* case the siphoning of the money of processors into the hands of farmers under the guise of taxation. As applied to this case, it prohibits the siphoning of the money of processors into the treasury of an autonomous government, to be spent in its untrammeled discretion for purposes which need not be public and, if public, need not be for the general welfare of the United States.

IX

TO CONSIDER THIS EXACTION AS NOT A TAX BUT AS AN IMPOSITION REGULATING FOREIGN COMMERCE, AS THE GOVERNMENT CLAIMS TO BE POSSIBLE, DOES NOT ADVANCE ITS CASE. IT IS NEITHER POSSIBLE TO SO CONSIDER IT NOR ARE THE INVALID SPENDING PROVISIONS MADE ANY MORE VALID BY SO DOING.

The Government has argued below that if this exaction be invalid as a tax, it can be sustained as an exercise by Congress of its power to regulate foreign commerce. But this argument simply refers to the exaction as an exaction and pays no attention to the invalid provisions for the spending of the proceeds thereof. We do not and could not argue that this imposition on the domestic processing of coconut oil of Philippine origin, viewed separately from the provisions for the spending of its proceeds, is invalid. As a processing tax pure and simple it is valid. It is entirely unnecessary therefore, and advances the Government case not a whit, to attempt to sustain it under the power of Congress to regulate foreign commerce.

This exaction is part of the Revenue Law of 1934 imposing income, estate and excise taxes. It is laid upon the intrastate processing of Philippine coconut oil after this imported oil has come to rest and has become part of the domestic goods within the States. Under the decision in *Schechter* v. *U. S.*, 295 U. S. 495, and *Carter* v. *Carter Coal Company*, 298 U. S. 238, such an imposition on the internal concerns of the States would be clearly invalid if sought to be justified solely as a regulation of interstate commerce. It is equally bad if sought to be justified solely

as a regulation of the foreign commerce which has preceded the interstate commerce, and hence is still more remote.

The cases cited by the Government, in which this Court has held invalid State occupation, license, and privilege taxes discriminating against imports and exports or as burdening interstate commerce, are entirely beside the point. In preserving the integrity of Congressional powers to regulate interstate commerce and foreign commerce from aggression by the States, it is plain that the States cannot be permitted to discriminate against imports, exports or interstate commerce under the guise of taxation. It is equally plain that Congress, having the power to regulate foreign commerce by direct taxes on imports, requires no implication of a power to levy exactions indirectly affecting imports.

The vice in this statute being the provisions for spending, the power under which the imposition is sought to be justified can make no difference. At least this would be so unless the spending could be in some way justified under some power other than the power to spend to pay the debts and to provide for the common defense and general welfare of the United States. Spending, however, can be justified under no other power, and if it could the spending provided for by this statute is clearly not justifiable under the foreign commerce power or any other. Some of the ways in which the Philippine Government might conceivably spend the money would doubtless affect foreign commerce but would not directly regulate it, even if it could be possibly thought that Congress could delegate to the Philippine Government its power to regulate foreign commerce.

Even supposing therefore, contrary to fact, that the Government could justify this imposition on domestic processing by resort to the foreign commerce power, its case is no better than it would be under the taxing power. All the infirmities which we have conclusively demonstrated to exist with respect to the spending provisions of the statute apply equally, irrespective of which power is resorted to in order to justify the imposition.

In making its argument upon this point, the Government distorts our argument with respect to the intrastate regulatory purpose and effect of the spending provisions of this statute and attempts to turn our argument against us. In this it cannot succeed. We do not argue that this exaction is unconstitutional because it may have the incidental effect of restricting imports of coconut oil from the Philippines. On the contrary, our argument is that the selling price differentials between coconut oil of Philippine origin and domestic oils and fats which are established by the laying of this imposition are "pegged" as a result of and as intended by the spending provisions of the statute. This purpose and this effect are the direct results of the spending provisions. The effect upon foreign commerce is the mere incidental result, and of this we do not complain.

CONCLUSION

It is submitted that the order of the United States District Court for the District of Nebraska, Omaha Division, sustaining respondent's demurrer to the petition, should be reversed and the case remanded to the United States Circuit Court of Appeals for the Eighth Circuit with instruc-

tions to overrule said demurrer and enter judgment in favor of petitioner.

Respectfully submitted,

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